

**Wide Ridge Distribs. Corp. v Byron**

2012 NY Slip Op 30413(U)

February 10, 2012

Supreme Court, Suffolk County

Docket Number: 06-11008

Judge: Peter Fox Cohalan

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.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 9-29-11  
ADJ. DATE 11-30-11  
Mot. Seq. # 006 - MD

-----X		
WIDE RIDGE DISTRIBUTORS CORP., and	:	WEBER PULLIN & CARBO LLP
BYRBER PROPERTIES, INC.,	:	Attorney for Plaintiffs
	:	7600 Jericho Turnpike
	:	Woodbury, New York 11797
	:	
	:	
Plaintiffs,	:	
	:	
	:	
- against -	:	SCOTT LOCKWOOD, ESQ.
	:	Attorney for Defendant
	:	1476 Deer Park Avenue, Suite 3
HARRY BYRON,	:	North Babylon, New York 11703
	:	
	:	
Defendant.	:	
	:	
-----X		

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (006)1 - 8; Notice of Cross Motion and supporting papers 9-10; Answering Affidavits and supporting papers 11-12; Replying Affidavits and supporting papers    ; Other    ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that motion (006) by the defendant, Harry Byron, pursuant to CPLR §3212 for an order dismissing the complaint, or partial summary judgment dismissing all claims accruing prior to May 12, 2000 as timed barred, is denied.

Wide Ridge Distributors Corp. (hereinafter Wide Ridge) is in the retail business of selling beer and soda at 899 Middle Country Road, Selden, New York, which premises is owned by Byrber Properties, Inc. (hereinafter Byrber). Harry Byron (hereinafter Byron) was the owner and holder of 75% of the issued and outstanding shares of the capital stock of both Wide Ridge and Byrber from about January 1986 until December 17, 2003, and Steven Corso (hereinafter Corso) claims to have owned the remaining 25% thereof. On December 17, 2003, Byron sold and conveyed his 75% stock interest in both Wide Ridge and Byrber to Corso.

The complaint alleges that at various times between January 1986 and December 17, 2003, the defendant Byron, without the knowledge or consent of Byrber, Wide Ridge, or other officers, directors, or shareholders thereof, willfully, intentionally, unlawfully and fraudulently converted, misappropriated and/or misapplied funds, assets, and properties belonging to Wide Ridge and Byrber to and for his own personal use, in the amount of approximately \$500,000.00. The plaintiffs assert in their first cause of action that they are unable to determine the amount actually misappropriated by Byron because prior to December 17, 2003 he exercised exclusive possession, custody and control over all the financial records and transactions of both Wide Ridge and Byrber, to the exclusion of all other financial officers,

directors and shareholders. The plaintiffs additionally seek punitive damages in the amount of \$1,000,000.00. In the second cause of action, the plaintiffs assert that Byron breached his fiduciary duty to the corporations, officers, directors, shareholders and respective creditors, by his failure to truthfully, properly and fully disclose the financial conditions of the corporations to the plaintiffs. In the third cause of action, the plaintiffs allege that Byron breached his duty of loyalty, fidelity and good faith dealings by misappropriating corporate property from each of the plaintiffs. The fourth cause of action alleges that Byron breached his statutory duty pursuant to Business Corporation Law §719 and §720 of fair dealing, fidelity and loyalty.

In a counterclaim, Byron alleges that from January 1986 until December 17, 2003, he was the owner and holder of 87 ½ % of all issued and outstanding stock of both World (sic) Ridge and Byrber and that Corso, a principal of the plaintiffs, was the owner of 12 ½ % of all issued and outstanding stock in both corporations. Byron alleges that between January 1986 and December 17, 2003, that the plaintiffs willfully, intentionally, unlawfully and fraudulently converted, misappropriated, to and for his (sic) own personal use, substantial sums of money and other assets of both World (sic) Ridge and Byrber. Byron further alleges he is unable to state with certainty the amounts wrongfully converted and seized by Corso during the pendency of the business. Byron seeks \$2,000,000.00 on the counterclaim.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for his failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1989]). The opponent must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleading are real and capable of being established at a trial (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant a court as a matter of law in directing judgment in favor of any party (CPLR §3212 [b]).

In motion (006), defendant Byron seeks dismissal of the complaint asserted in the main action because all anomalous transactions were business related and not for personal use, and that any claims 6 years prior to commencement of the action are barred by the applicable statute of limitations. In support of this motion, Byron has submitted, *inter alia*, an attorney's affirmation; a copy of the summons and complaint, Byron's answer, amended verified complaint; verified answer to the amended complaint, and discovery demands; an unsigned copy of the transcript of the Corso's examination before trial (hereinafter EBT), dated April 8,

2011, marked certified but which does not contain the certification page; and an unsigned copy of Byron's EBT transcript, dated April 11, 2011, marked certified but which does not contain the certification page. The plaintiff does not object to the use of these unsigned but certified EBT transcripts (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). Byron has not provided this Court with the copies of the third-party complaint or third-party answer in the action which was commenced against the third-party defendant Corso, as reflected in Byron's exhibit C, as required pursuant to CPLR §3212.

Even if those third-party pleadings had been provided, the defendant Byron has not established prima facie entitlement to summary judgment dismissing the complaint. None of the certificates of incorporation, partnership agreements between the parties, business records, or banking and account records have been provided to the Court as evidentiary proof in support of this motion. The EBT testimony of the parties raises factual and credibility issues which preclude summary judgment relating to, but not limited to, the amount of cash paid to the parties from the business; how much cash Byron paid back into the business, if any, in exchange for payments for his son's college tuition; the three car leases for him, his wife and son; vacations; and credit card use, among other things. There are additional factual issues raised in the moving papers concerning the various accounts set up by Wide Ridge, which account statements have not been submitted, and as to where the money paid to Byron from the various lines of credits from several banks was deposited, what it was used for, and if it was paid back with corporate funds. No accounting of any of the corporate books has been provided to establish that the cash allegedly paid back into the corporate accounts was paid by Byron. There are factual issues concerning whether Corso purchased a 25% or a 12 ½ % interest in the businesses pursuant to the partnership agreement which also has not been produced.

At his EBT, Corso testified that he had been employed by Wide Ridge for 39 years, and, in about 1983, he became a partner and purchased 25% of the corporation pursuant to a partnership agreement drawn by Byron. Byron's partner, Joe Berni (hereinafter Berni) left the partnership at that time. Byron and Berni each had a 50% interest in the corporation, and when Berni left, Byron took another 25%, for a total of 75% interest, and Corso received a 25% interest in Wide Ridge. Corso stated his position with Wide Ridge involved overseeing the unloading and stocking of inventory and assisting customers. Byron was responsible for inventory and bookkeeping. The corporation had two employees, Byron's wife who helped Byron with bookkeeping and management, and Gary Calhoun who assisted Corso with packing out and unloading. Corso did not know how much they were paid.

Corso further stated that in 2003 a purchase agreement was entered into between Byron and Corso, wherein Byron sold his interest in Wide Ridge and Byrber. Corso was to be a 49% partner and Keith Jansen, was to be a 51% partner. After the closing, he found boxes on top of a refrigerator which contained papers which reflected payments that were made by Byron for things other than Wide Ridge business, including payments made by checks from the corporation for automobile loans for Byron, Byron's wife and son; college tuition for Byron's son; bank lines of credit and mortgages with certain banks; charge cards with American Express billing for a vacation by Byron to Hong Kong, dining expenses, and additional items

Wide Ridge v Byron  
Index No. 06-11008  
Page 4

from 1995 to 2004. Corso stated that he had no knowledge that Byron was making these payments or receiving those monies. He did not know if the corporate record or minutes would have barred such payments. Corso stated that the payments by Byron were being made from money which was to have been split between them. Byron was in charge of bookkeeping, so Corso did not know Byron's salary. Corso received \$295.00 weekly. Corso testified that he was not permitted to examine the books prior to the closing as Byron kept them at all times. After the closing, corporate profits began to increase.

At his EBT, Byron testified that the Byrber was named after him and his former partner Berni. They went into business in 1964 as a wholesale/retail beverage outlet known as Wide Ridge. Berni remained as a partner until 1986, at which time Byron entered into the agreement with Corso. At that time, Berni sold his interest in Byrber to Byron, so that Byron became a 100% owner of Byrber. Byron purchased 37 ½ % of Berni's interest in Wide Ridge, leaving Corso with 12 ½ % of Berni's 50%. He then stated that Corso's interest was 25% of Berni's interest on paper, but actually Corso had a 12 ½ % interest pursuant to a private agreement between him (Byron) and Corso. Byron then testified that the note held by Berni was paid off. Corso owed him 12 ½ % of the note paid for from corporate assets. Byron's testimony is somewhat unclear, as he then stated he was paying his 50% plus the note, but that he set it up as 75 % / 25 % ownership between him and Corso for the State Liquor Authority. Byron testified that he did not pay any cash down payment to Berni, and he did not know if Corso did.

Byron further testified that he paid all the bills, did all the ordering, and ran the business. He testified that his wife Susan Byron assisted him at times, but she received no compensation. He was unsure what entity provided him with the mortgage on his home. He identified checks signed by him, issued to Long Island Savings Bank from an account at North Fork Bank, which account was a Wide Ridge account. He testified that his accountant advised him to pay his mortgage and personal bills from the Wide Ridge account. He stated that Lloyd Capital owned a mortgage on the property owned by Byrber. A check in the amount of \$6,495.00 was posted "exchange" payable to St. Michael's College on December 12, 1989. There was another bank mortgage with Union Savings Bank, but he did not know if it was for the Byrber property and thought it could have been for a mortgage on his personal residence. An entry on documents shown to Byron indicated payment for Brookhaven Cable Service for Wide Ridge, as an exchange; another GMAC payment for a leased vehicle leased to Wide Ridge, listed as an exchange; and a monthly payment to Berni in the amount of \$1,229.00 for the buyout, listed as an exchange; and St. Michael's College in the amounts of \$7,037.50 and \$7,107.50 for his son's tuition. The word "exchange", he stated, meant that instead of his taking cash from the business, he paid his bills with the money. Byron testified that he and his partner were paid a lot of cash. He continued that his salary on the books was not enough to cover the tuition, so his accountant suggested that he leave his cash in the business and pay the tuition from the business checkbook. He continued that he had no separate personal credit card account or bank account, so the money was commingled. An additional new loan in the amount of \$150,000.00 was taken out by Byrber from North Fork Bank in 1994, but its use was not explained.

Wide Ridge v Byron  
Index No. 06-11008  
Page 5

Byron testified that when the State took some of the business property by eminent domain, payments in the amount of \$180,000.00 and \$216,000.00 were made by the State in compensation in approximately 1996. He deposited the first check into the Wide Ridge account, and the second check into the North Fork Bank account, but he later testified that it went into Wide Ridge and then into Byrber. He wrote himself a check in the amount of \$75,000.00 from the proceeds from the State. He did not testify that any money was given to Corso. He then built a new building at a cost of about \$300,000.00. Construction was completed in about 2000. He also took a line of credit with North Fork Bank to finance the mortgage and received \$200,000.00 which he deposited into the Wide Ridge account. He obtained a line of credit from Astoria Federal Savings which gave him a loan for approximately \$50,000.00, which he put into the Wide Ridge account. He testified that they also had a line of credit for \$20,000.00 with Wells Fargo Bank but did not know why it was taken out.

Byron further testified that Wide Ridge had an American Express credit card, usually kept in his pocket, which he used to pay for vacations or other things. He stated he made the credit card payments by leaving his cash in the business. He stated that Wide Ridge had an account with JP Morgan Chase Bank, and he received a check in the amount of \$15,000.00 on a line of credit deposited into his account. Another check in the amount of \$20,000.00 was made payable to him and deposited into JP Morgan Chase Bank where he testified he "must have had another account." He could not explain the purpose for being paid these two checks. He also leased 3 cars for the business, one each for him, his wife, and his son through Wide Ridge, and stated that he paid the business back with cash.

Byron testified that he was also the president of Beverage Busters, an advertising group, which occasionally issued checks to him for his services and would also pay him interest, but he did not know why. Toward the end of Beverage Busters, "the principals were sort of taking a little bit of money because we had a lot of money in our checking account" which Wide Ridge and other principals paid into. Byron testified that he received a salary on a regular basis from Wide Ridge or Byrber, or both in the amount of \$60,000.00 annually (\$1,200.00 per week). Corso received a salary of about \$25,000.00 to \$30,000.00 annually.

Based upon the foregoing, Byron has not established prima facie entitlement to summary judgment, as there are numerous factual issues raised in his testimony which preclude dismissal of the plaintiffs' complaint. The many credibility issues raised can only be resolved by the trier of fact. As set forth above, no evidentiary proof has been submitted by Byron in support of his application.

While Byron also argues that a significant portion of the claims asserted by the plaintiffs arose prior to May 12, 2000, and that they are barred by the applicable statute of limitations pursuant to CPLR §213 (7), the paucity of evidentiary submissions and the insufficiency of the moving papers, as a matter of law, preclude this Court from making a determination as to the applicable statute of limitations. Byron has not established prima facie that he did not engage in fraud, misrepresentation, deceit, breach of fiduciary duties, or breach of loyalty and good faith dealings. With regard to Byron's arguments against equitable tolling, such doctrine can prevent a defendant from pleading the statute of limitations as a defense, where, by fraud, misrepresentation, or deception, he or she has induced a plaintiff to refrain from filing a timely

Wide Ridge v Byron  
Index No. 06-11008  
Page 6

action. Equitable tolling is applicable where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action (see **Kotiyarsky v New York Post**, 195 Misc2d 150, 757 NYS2d 703 [Sup. Ct., Kings County 2003]). Fraudulent representations may play a dual role in that they may be the basis for an independent action for fraud, and may also, in equity, be a basis for an equitable estoppel, barring the defendant from invoking the statute of limitations as against a cause of action for breach of fiduciary relations where Corso was induced by fraud, misrepresentations or deception to refrain from filing a timely action (**Simcuski v Saeli**, 44 NY2d 442, 406 NYS2d 259 [1978]). Here, there are additional factual issues concerning the amount of power and control exercised over the corporate assets, business, and records by the majority shareholder, and whether that control permitted Byron to engage in fraud, misrepresentation, deceit without the knowledge of the plaintiffs, or the ability for the plaintiffs to discover the same (see **Guthartz v Goldrick**, 19 Misc3d 861, 855 NYS2d 358 [Sup. Ct., Nassau County 2008]; **Moreau v Archdiocese of New York**, 261 AD2d 456, 690 NYS2d 100 [2d Dept 1999]). Thus, Byron has not demonstrated entitlement to dismissal of the causes of action as barred by the applicable statute of limitations for any dates prior to May 12, 2000.

Accordingly, motion (006) is denied in its entirety.

FEB 15 2012

Dated: \_\_\_\_\_

  
\_\_\_\_\_  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION