

## Assets of LLC members beyond reach of litigants

By: David E. Frank    March 27, 2014



A judge could not amend a judgment by employing Rule 60 of the Massachusetts Rules of Civil Procedure to put the individual members of a limited liability company in place of the LLC itself, the Appellate Division of the District Court has ruled.

Two commercial fishermen, who obtained a \$19,314 judgment on a counterclaim brought against the LLC, argued that the measure by the judge was permissible because

the LLC's members fraudulently filed a certificate of cancellation with the secretary of state just weeks before trial.

But Judge Stephen S. Ostrach, writing for the appellate panel, disagreed and found that the LLC's assets were beyond the reach of the fishermen.

"Any concern that the members were attempting at the eleventh hour to change the LLC's status in a way that would harm the movants was unwarranted, since the LLC's cessation of operations had occurred over a year earlier, long before the LLC sued or the movants counterclaimed," Ostrach said. "Even if 'dissolution' might have had a negative impact on [the fishermen's] rights, it took place long before their claim had arisen and so no invidious motives can be attributed to the members."

The seven-page decision is *Marina Sales & Service, LLC, et al. v. Theoharidis, et al.*, Lawyers Weekly No. 13-014-14. The full text of the ruling can be ordered by clicking [here](#).

### **Cancellation vs. dissolution**

Patricia A. DeJuneas, who represented the plaintiff LLC, said the law affords individual members of an LLC greater protection than corporations and other legal entities.

The Boston lawyer said the court clearly held an LLC's assets can be reached only in limited circumstances under the LLC statute, G.L.c. 156C.

"With so little caselaw out there, and this LLC law being a relatively new statutory creature, there's just no guidance as to what the statute and many of its terms mean," she said. "The language of the act is fairly clear. What a decision like this will do is provide some guidance as to what a 'member' is and what it means to 'dissolve' as opposed to 'cancel' an LLC."

Dissolution occurs when steps are taken to wind down the financial activity of the LLC, DeJuneas said. The plaintiffs took that step a year before the case was tried before state District Court Judge Joan E. Lynch.

By the time judgment entered after trial, there were no assets left to share among the members, DeJuneas said.

"The only thing that happened before the trial was the cancellation of the LLC, which is just the formal filing of a document with the secretary of state saying that the LLC has stopped doing business, and it's going to cease existing," DeJuneas said. "There was just a fundamental misunderstanding by the opposing party and the lower court judge about what that term 'cancellation' means."

The onus was on the fishermen to ask about the financial conditions of the LLC, she said, but they never sought any discovery on the status of the LLC or made any other efforts to review any of its filings.

“Long before the trial started, the LLC simply wasn’t doing any business, which demonstrated that there wasn’t even a hint of anything fraudulent going on,” DeJuneas said. “There were no funds there, and we showed through our affidavits that the funds had been paid out properly.”

Michael J. Wilson of Nantucket, counsel to the fishermen, said the dispute arose over the LLC’s failure to properly repair his clients’ boat, which cost them an entire season of work.

Wilson said his clients financially were unable to oppose the appeal. As a result, they did not file an opposition or argue the matter to the Appellate Division of the District Court.

“They were just exhausted and beaten down and didn’t have the fight or the money,” Wilson said. “They would’ve been starting at square one with a new appellate attorney, and it wasn’t a good cost-benefit analysis for them when they looked at what they were going to spend in order to get their \$19,000.”

Wilson said Rule 60 allows for post-judgment relief for any number of reasons, including fraud and misrepresentation.

“I told Judge Lynch that this wasn’t fair because you’ve got some very wealthy people walking away leaving these commercial fishermen with a judgment against them and scoffing at them by basically telling them that they could try to collect but there’s nothing there,” Wilson said. “So I went in front of the judge and explained what they did, which was to do whatever they wanted to do knowing darn well that, whatever my clients got by way of a counterclaim, they had already pocketed it and were going to hide behind a shell.”

He said the Appellate Division’s decision did not change fact that the fishermen won at trial and before Lynch on post-trial motions. The appellate panel was frustrated by the fact that no reply brief was filed, he added.

“It was deflating to find out that you have to spend more money just to uphold the jury’s verdict,” he said. “Who knows what the decision would’ve been had there been an opposition. I suspect that my clients would have prevailed, but we will never know.”

### **‘The fight’**

On May 13, 2011, a jury in Barnstable District Court returned a \$5,537 verdict in favor of plaintiff Marina Sales & Service LLC in an action against defendant fishermen Dennis Theoharidis and Allen Renaud. The same jury awarded the fishermen \$19,314 on a counterclaim against the LLC.

Almost a year later, the fishermen filed a motion for relief from judgment under MRCP 60(b)(3)(6). The motion stated that the LLC had failed to inform the court or the fishermen that, in March 2011, a certificate of cancellation had been filed on the LLC’s behalf with the secretary of state.

The fishermen asked Lynch to vacate the judgment on the counterclaim against the LLC and enter it against its individual members.

Lynch allowed the motion in June 2012 on grounds that the LLC members did not disclose they had filed the certificate of cancellation 10 days before the original trial date.

When Lynch denied a motion to reconsider, the LLC appealed.

### **Some kind of misunderstanding**

In vacating the order, Ostrach said the court’s task was made more difficult by the “inexplicable failure” of the fishermen to participate “in any fashion” in the appeal.

He said the LLC’s failure to notify the court of the cancellation was not the kind of fraud or misrepresentation that would justify post-judgment relief. The LLC had no duty to tell the fishermen or Lynch about the filing of a publicly available, routine and legally insignificant ministerial action, Ostrach said.

Contrary to the fishermen’s claims, the personal assets of the LLC members were always presumptively beyond the reach of the defendants, the panel said.

“The LLC law on this point is clear,” Ostrach said. “[N]o member or manager of [an LLC] shall be personally liable, directly or indirectly, ... for any such debt, obligation or liability of [the LLC] solely by reason of being a member or acting as a manager of [the LLC].”

He said the passage of Chapter 156C did not change that proposition. Instead, it created an additional level of protection for a liquidating trustee.

“The [other] misunderstanding of the law in the movants’ case is their suggestion, adopted below, that filing the certificate of cancellation was equivalent to ‘dissolving’ the LLC,” Ostrach wrote. “It is not.”

In the LLC context, dissolution essentially means that the nature of the LLC ceases to be an operating company, he said. Its sole objective is to efficiently conclude the business of the LLC.

“‘Cancellation,’ which occurred in March, 2011, is a separate event that occurs after ‘the completion of the [post-dissolution] winding up’ of the LLC,” the judge wrote. “Based on the uncontroverted ... affidavits, the LLC ceased business operations in January, 2010, which thus was the effective date of dissolution.”

**CASE:** *Marina Sales & Service, LLC, et al. v. Theoharidis, et al.*, Lawyers Weekly No. 13-014-14

**COURT:** Appellate Division of the District Court

**ISSUE:** Could a state District Court judge amend a judgment by using Rule 60 of the Massachusetts Rules of Civil Procedure to substitute the individual members of a limited liability company for the LLC itself?

**DECISION:** No

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