SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **53**

Justice

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LNH, LLC,

Plaintiff,

- v -

SARATOGA CENTER FOR CARE, LLC, OAKMONT CARE, LLC, JEFFREY VEGH, TALI VEGH, ALAN (A/K/A ARI) SCHWARTZ, DANIELLA SCHWARTZ,

Defendant.

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INDEX NO. 653774/2020

MOTION DATE 12/23/2020, 01/27/2021, 02/23/2021

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

JEFFREY VEGH, TALI VEGH, ALAN (A/K/A ARI) SCHWARTZ, DANIELLA SCHWARTZ

Plaintiff,

-against-

LEON MELOHN, MELOHN CAPITAL, LLC, JACK JAFFA, SKYLINE HEALTH CARE LLC, JOSEPH SCHWARTZ, LOUIS SCHWARTZ, CHAIM SCHEINBAUM, BRANDON AUGUSTYNIAK

Defendant.

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Third-Party
Index No. 595909/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 41, 42, 43, 44, 45, 46, 58

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 47, 59

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63

were read on this motion to/for DISMISSAL.

The motion to dismiss (Mtn. Seq. No. 1) the Third Party Complaint (**TPC**) against Melohn Capital LLC must be granted. The first and second causes of action were not brought against

Melohn Capital. The third (conversion) and fourth (unjust enrichment) causes of action fail to state a claim under CPLR 3211(a)(7) because the allegations set forth in the TPC seek to ground liability based solely on the fact that Melohn Capital is owned exclusively by Leon Melohn and was the "c/o" place where notices were to be sent. The elements of a conversion claim are (i) intent, (ii) interference to the exclusion of the owner's rights and (iii) possession (*Meese v Miller,* 79 AD2d 237 [4d Dept 1981]) and the elements of unjust enrichment are (i) the other party was enriched, (ii) at that party's expense and (iii) it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Wells Fargo Bank, NA v Bure,* 155 AD3d 668 [2d Dept 2017]). The allegations in the TPC are plainly insufficient to support either theory as against Melohn Capital (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Thus, the complaint must be dismissed without prejudice against Melohn Capital.

Chaim Scheinbaum's motion (Mtn. Seq. No. 2) must be granted and the TPC must also be dismissed against Mr. Scheinbaum. Simply put, the third party plaintiffs do not have standing to level the conversion (third cause of action) and the unjust enrichment (fourth cause of action) against him. Mr. Scheinbaum is alleged to have been a consultant to Skyline Health Care LLC (Skyline) and Jack Jaffa and a designee and assignee of LNH, LLC and the third party plaintiffs allege that they incurred personal liability for judgments, tax and other penalties lawsuits by unpaid vendors and lawsuits by residents of the nursing home facilities. However, fatal to their claims is that they do not own the facilities – Saratoga Center for Care, LLC and Oakmont Care, LLC. Stated differently, if there is a claim against Mr. Scheinbaum by virtues of these allegations, it is not their claim. The general rule is well known – i.e., that a stockholder does not

have an individual cause of action against a person or entity that has injured the corporation even where the alleged wrongful acts may have diminished the value of the shares of the corporation or that the shareholder incurs personal liability in an effort to maintain the solvency of the corporation or that the wrongdoing may ultimately share in the recovery in a derivative action if the wrongdoer owns share in the corporation (*Serino v Lipper*, 123 AD3d 34 [1st Dept 2014]). A narrow exception exists when the wrongdoer has breached a duty owed directly to the shareholders independent of the duty owed to the corporation. This narrow exception can not conflate derivative and individual rights or replace a recovery that otherwise duplicates or belongs to the corporation. In *Yudell v Gilbert,* 99 AD3d 108 (1st Dept 2012), New York adopted the test developed in Delaware in *Tooley v Donaldson, Lufkin & Jenrette, Inc.,* 845 A2d 1031, 1039 (Del 2004), in determining whether the claim is derivative or direct, namely: (1) who suffered the harm and (2) who would receive the benefit of any recovery. Applying the test to the case at bar, it is clear that owners of the facilities, and not the third party plaintiffs, suffered the alleged harm and would receive the benefit of any recovery. This does not fall into the limited exception recognized in *Lipper* where the Appellate Division held that the claim regarding the gift taxes paid was independent and not an embedded claim, *i.e.*, unlike the claim for lost value of his holdings and for lost earning capacity which were inextricably embedded in the derivative claim because, as to claim based on the individual gift tax, there was an independent duty. Here, because no independent duty is alleged, it does not survive the *Yudell* test. Thus, as pled the claim is derivative and the complaint against Mr. Sheinbaum must be dismissed without prejudice.

Jack Jaffa's motion (Mtn. Seq. No. 3) to have the conversion (third cause of action) and unjust enrichment (fourth cause of action) but not the cause of action based on the indemnification agreement (second cause of action) dismissed must also be granted for the same reasons. For the avoidance of doubt, *Meseonznik v Govorenkov,* 36 Misc 3d 1240(A) (Sup. Ct. Kings County 2012) does not suggest a different result and in any event is not binding upon this court. The issue in front of the *Meseonznik* court (Demarest, J.) was in the context of a dissolved corporation whether the claims had to be brought derivatively and in examining the claims in that case, and in relying on *Craven v. Rigas,* 85 AD3d 1524, 1527 [3d Dept 2011], *appeal dismissed* 17 NY3d 932 [2011], the court held that under the *Yudell* test, the gravamen of the claims were that the plaintiff was seeking to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation. Accordingly, the motion (Mtn. Seq. No. 3) is granted, because as pled the conversion claim and the unjust enrichment claim must be dismissed without prejudice

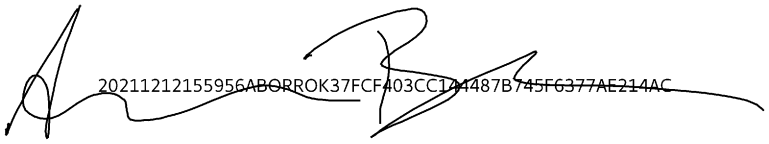
Accordingly, it is

ORDERED that Melohn Capital LLC's motion to dismiss is granted without prejudice; and it is further

ORDERED that Chaim Scheinbaum's motion to dismiss is granted without prejudice; and it is further

ORDERED that Jack Jaffa's motion to dismiss is granted without prejudice, solely to the extent of Third Party Complaint's the third (conversion) and fourth (unjust enrichment) cause of actions are dismissed without prejudice; and it is further

ORDERED that a remote status conference is ordered as of December 13, 2021 @ 2:30 pm via Teams.



12/12/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE