

<b>Stuchin v Medtechdirect, Inc.</b>
2022 NY Slip Op 30211(U)
January 24, 2022
Supreme Court, New York County
Docket Number: Index No. 652000/2020
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA JAMES PART 59

Justice

-----X

STEVEN STUCHIN,

Plaintiff,

- v -

MEDTECHDIRECT, INC.,STEPHEN FOTI, EISERTECH,
LLC, and TESLAKE, INC.

Defendants.

-----X

INDEX NO. 652000/2020

MOTION DATE 11/19/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL

ORDER

Upon the foregoing documents, it is

ORDERED that defendants' motion to dismiss the amended complaint is GRANTED to the extent that the complaint in its entirety is dismissed against defendants Stephen Foti, Eisertech, LLC and Teslake, Inc.; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Stephen Foti, Eisertech, LLC, and Teslake, Inc. dismissing the claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants' motion to dismiss the amended complaint to the extent of dismissing the fourth and fifth

causes of action against the remaining defendant is granted; and it is further

ORDERED that the motion is otherwise DENIED and the remaining claims against defendant MedTechDirect, Inc. are severed and shall continue; and it is further

ORDERED that defendant MedTechDirect, Inc., shall serve an answer to the amended complaint within thirty days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the plaintiff and the remaining defendant are directed to post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference order on March 30, 2022.

DECISION

The court shall deny defendants' motion to dismiss the first, second and third causes of action for breach of contract, unjust enrichment and quantum meruit of the amended complaint, as against defendant MedTechDirect, Inc., without prejudice to the extent it is premised on the statute of frauds (General Obligations Law § 5-701[a][10]) requirement of a writing for "a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business". At this pleading stage, it cannot be determined whether the services

alleged to be provided by the plaintiff, i.e., the alleged "negotiations with HSS", as described in the complaint, are sufficient to constitute acts which are within the statute of frauds (contrast Dorman v Cohen, 66 AD2d 411, 417 [1st Dept 1979] [statute of frauds found not satisfied only upon searching the record after joinder of issue and discovery]) because the complaint also asserts that such "services. . . went beyond the negotiation or consummation of a business opportunity" (see Dorfman v Reffkin, 144 AD3d 10, 19 [1<sup>st</sup> Dept 2016]).

The court shall grant the motion to dismiss to the extent of dismissing the foregoing causes of action against defendants Stephen Foti, Eisertech, LLC and Teslake, Inc., as the complaint expressly states that the only privity was between plaintiff and defendant MedTechDirect, Inc. As for the unjust enrichment cause of action, the complaint does not allege that plaintiff provided services at the behest of such defendants (see Georgia Malone & Co., Inc. v Rieder, 86 AD3d 406, 408 [1<sup>st</sup> Dept 2011]). Likewise, the quantum meruit cause of action is insufficiently pled against such defendants, as such claim arises out of the subject matter covered by an express contract (see Dabrowski v Abax, Inc., 64 AD3d 426, 427 [1<sup>st</sup> Dept 2009]). Nor does the complaint allege a factual basis for a claim of successor liability on the part of such defendants (see Grant-Howard Associates v General Housewares Corp., 63 NY2d 291 [1984]).

Plaintiff's claims for fraudulent transfer and breach of fiduciary duty against defendant MedTech Direct, Inc., by reason of his status as a shareholder thereof, confuses his rights as an individual with shareholder's derivative rights (see Abrams v Donati, 66 NY2d 951, 953 [1985]). As the proper vehicle for such claims is a shareholder derivative action, the action at bar shall be dismissed, without prejudice to the commencement of a shareholder derivative lawsuit (see, for e.g., Santiesteban v Crowder, 92 AD3d 544 [1<sup>st</sup> Dept 2012]).

*Debra A. James*  
20220124160133DJAMESAFAA1784336B43BBA2FDC589E5869CFE

<u>1/24/2022</u> DATE					<u>DEBRA JAMES, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE