

**Tribeca Tech. Solutions, Inc. v Goldberg**

2013 NY Slip Op 31313(U)

June 17, 2013

Sup Ct, NY County

Docket Number: 651878/11

Judge: Anil C. Singh

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
*Justice*

PART 61

Index Number : 651878/2011  
TRIBECA TECHNOLOGY SOLUTIONS  
vs.  
GOLDBERG, DAVID  
SEQUENCE NUMBER : 007  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 6/18/2013

ACS  
HON. ANIL C. SINGH, J.S.C.  
SUPREME COURT JUSTICE

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X

TRIBECA TECHNOLOGY SOLUTIONS, INC.,

Plaintiff,

-against-

DAVID GOLDBERG, SCOTT SIMON, EDWARD  
SCHAPIRO, AMERICAN MEDICAL DATA  
MANAGEMENT, LLC, AMDM, LLC, and AMDM, INC.,

Defendant.

-----X

DECISION AND  
ORDER

Index No.  
651878/11

HON. ANIL C. SINGH, J.:

This is a dispute over the right to manufacture, market, and profit from sales of a product named the "Intelliseat," an electronic toilet seat.

Defendants American Medical Data Management, LLC, AMDM, LLC, and AMDM, Inc. (collectively, the "corporate defendants") and individual defendant Edward Shapiro move to dismiss the second, fourth, and fifth causes of action of the complaint pursuant to CPLR 3211(a)(1) and (7), contending that the complaint fails to state causes of action for misappropriation, aiding and abetting breach of a fiduciary duty, and conspiracy. Plaintiff opposes the motion.

The complaint alleges the following facts.

Plaintiff Tribeca Technology Solutions, Inc. ("Tribeca") is in the business of

wholesale distribution of computing and consumer electronics. In addition, it was involved in the “commercialization” of other consumer products, including the Intelliseat. Plaintiff contends that it is entitled to all of defendants’ profits from sales of the Intelliseat, as defendants have no legal right to be involved in any way in the design, manufacture, marketing or sale of the device.

Defendant David Goldberg is a former employee of plaintiff (Complaint, p. 2, para. 5). Defendant Scott Simon has held himself out as plaintiff’s former Chief Operating Officer (Complaint, p. 2, para. 6). Defendant Edward Shapiro financed the other defendants’ business activities (Complaint, pp. 2-3., para. 7).

The complaint alleges that, as a former employee of plaintiff, Goldberg was subject to the terms of a written non-disclosure and non-solicitation agreement dated February 20, 2008. According to plaintiff, defendants Goldberg and Simon violated the agreement by secretly forming AMDM LLC and selling Intelliseats.

As part of the effort to “commercialize” the device, plaintiff entered into a memorandum of understanding dated March 4, 2010, with a Korean-based company to manufacture the Intelliseat for sale in the United States, Canada and Korea. Defendant Goldberg signed the memorandum of understanding as plaintiff’s “Managing Director.”

Goldberg’s and Simon’s relationship with plaintiff was terminated around

June 2010. Subsequently, plaintiff discovered that Goldberg had been contacting plaintiff's customers and vendors in direct violation of his written agreement.

Plaintiff commenced the instant action by filing a summons and complaint on July 11, 2011, alleging five causes of action.

The first cause of action is for breach of contract.

The second cause of action sounding in misappropriation alleges that the defendants' use of information gathered by plaintiff is in direct competition with plaintiff's offering and is "a direct theft of the business" (Complaint, p. 10, para. 38).

The third cause of action is against defendants Goldberg and Simon for breach of fiduciary duty.

The fourth cause of action alleges that defendant Shapiro aided and abetted Goldberg's and Simon's breach of fiduciary duty.

The fifth cause of action alleges conspiracy.

Defendants' first contention is that the cause of action for conspiracy should be dismissed based upon the certificate of incorporation of defendant American Medical Data Management, Inc. (Notice of Motion, exhibit C). Defendants point out that the corporation established its existence as of July 18, 2003, and that plaintiff's employment relationship with defendant Goldberg began in 2008, five

years after the company was formed. Based on this timing, defendants contend that the defendants could not have conspired to form the corporation to steal any business from plaintiff.

It is proper to dismiss a complaint pursuant to CPLR 3211(a)(1) only where the documentary evidence submitted utterly refutes the allegations of the complaint and conclusively establishes a defense as a matter of law (Abdulayev v. Yadgarov, 105 A.D.3d 877 [2d Dept., 2013]).

Under CPLR 3211, the Court is required to consider the facts set forth in the complaint in the light most favorable to plaintiff. Here, the documentary evidence is insufficient to demonstrate conclusively that the defendants never conspired to misappropriate plaintiff's business. Accordingly, it would be erroneous for the Court to dismiss plaintiff's claims based on nothing but the certificate of incorporation, for the Court is required under CPLR 3211(a)(7) to assume the truth of the allegations in the complaint.

Defendants' second contention is that plaintiff's complaint fails to state a cause of action to pierce the corporate veil and hold defendant Shapiro liable for misappropriation of confidential information.

Defendant Shapiro states in a sworn affidavit that he is the President of American Manufacturing Distribution Management, Inc. According to Shapiro,

AMDM, Inc., is a d/b/a of his employer.

Misappropriation is a form of tort (Sporn v. MCA Records, Inc., 88 A.D.2d 857 [1<sup>st</sup> Dept., 1982]). “[A] corporation is liable for the torts and wrongful acts or omissions of its officers, agents, or employees acting within the scope of their authority or the course of their employment, and a person injured may generally hold both the corporation and the corporate employee liable as joint tortfeasors” (14A N.Y.Jur.2d Business Relationships section 510). Accordingly, the Court finds that the complaint asserts a valid cause of action for misappropriation.

Defendants’ next contention is that the cause of action for aiding and abetting breach of fiduciary duty should be dismissed.

The complaint alleges that defendant Shapiro knew that defendants Goldberg and Simon had fiduciary obligations to plaintiff; that Shapiro had actual knowledge of the breaches of fiduciary obligations by defendants Goldberg and Simon; and that Shapiro “knowingly induced and participated in the breach of fiduciary obligations by funding the defendants’ theft of and illegal commercialization of the Intelliseat” (Complaint, p. 11, paras. 46-48).

It is not entirely clear at this early stage of the litigation what fiduciary duty Simon owed. Nevertheless, it is clear that Goldberg owed a fiduciary duty to plaintiff as his former employer. Accordingly, the Court finds that the complaint

sufficiently states a cause of action for aiding and abetting breach of fiduciary duty.

Defendants' final contention is that the complaint fails to sufficiently plead a cause of action for conspiracy.

On its face, the complaint alleges that the defendants have committed the primary torts of misappropriation, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. It alleges further that the defendants made an agreement to commercialize the Intelliseat to the exclusion of plaintiff; that they made overt acts in furtherance of their agreement by marketing and selling the product to Costco and individual consumers on the Internet; and that the defendants each intentionally participated in furtherance of their plan to commercialize the Intelliseat to the exclusion of the plaintiff (Complaint, p. 12, paras. 51-54).

“In order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement” (Perez v. Lopez, 97 A.D.3d 558, 560 [2d Dept., 2012]).

In short, the Court finds that the complaint sufficiently alleges these elements.

Accordingly, it is

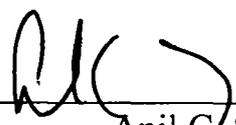
ORDERED that the motion is denied in its entirety; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on SEPTEMBER 25<sup>TH</sup>, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 9/17/13  
New York, New York

  
Anil C. Singh

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**