

**Functional Life Achievement, Inc. v Aspiring
Munchkins LLC**

2022 NY Slip Op 30408(U)

February 3, 2022

Supreme Court, New York County

Docket Number: Index No. 655583/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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FUNCTIONAL LIFE ACHIEVEMENT, INC.,

Plaintiff,

- v -

ASPIRING MUNCHKINS LLC, MEI HAR CHEW, QI GUO,
ELAINE CHING-YEE LO A.K.A. ELAINE CHING-YEE
CHOW, MARIAN SHENG, JILIN YIN, YINSHENG
FLUSHING LLC

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for

DISCOVERY

**DECISION + ORDER ON
MOTION**

The motion by plaintiff to compel an additional deposition of defendant Mei Har Chew to appear on behalf of defendant Aspiring Munchkins (“AM”) and in her individually capacity with respect to three categories of documents produced after her previous deposition, and to compel the production of certain documents prior to the deposition is granted.

Background

Plaintiff contends it operates an agency that provides services for infants and toddlers with disabilities under the New York State Early Intervention Program. It claims that this case involves its former clinical director, service coordinator, and another staff member and their combined efforts to use plaintiff’s confidential and proprietary information to start a competing business. Plaintiff explains that defendant Chew was the clinical director and had full access to plaintiff’s proprietary information.

Plaintiff identifies three categories of documents that were not produced at the time of Chew's first deposition. These include 1) specific website pages the Court ordered AM to produce, which allegedly have not been produced, 2) numerous additional policies AM produced months after Chew's initial deposition, and 3) provider contracts, including a purported contract between AM and a current employee of plaintiff.

The website pages relate to defendants' claim that they consulted policies used to form AM's provider applications from city and state websites; plaintiff simply wants the pages that defendants relied on. Plaintiff claims that defendants sent over a document entitled Resources which listed over 100 web pages, many of which were no longer accessible. It also points out that certain documents show that they could not have been relied upon in connection with the state application because they are dated after the application.

Plaintiff also explains that to get an early intervention provider contract, an applicant has to identify individuals approved to deliver early intervention services. It insists defendants named four people, all of whom were under contract with plaintiff. Plaintiff maintains that Chew gave evasive answers at her deposition regarding whether AM entered into contracts with these individuals. It observes that defendants eventually produced contracts and should have the chance to question Chew about these.

The newly produced checklists, policies and procedures were produced after Chew's deposition and plaintiff argues it should have the chance to question Chew about this discovery.

In opposition, defendants maintain that plaintiff does not understand the approval process for the formation of an early intervention agency in New York. They explain that plaintiff is in possession of the application used by AM and attaches a copy of the application annotated by Chew to show where information arises from the application or from various websites.

Defendants insist that it has provided a document containing hyperlinks regarding AM's business plans and argues that plaintiff is simply conducting a fruitless search for its claim that defendants stole information from plaintiff.

Defendants point out that Chew left her job at plaintiff in 2015, a few weeks after she received initial approval from New York State to start her own early intervention agency. They insist that they simply consulted various state and city websites while drafting their application but did not print out the portions of those websites, so they could not produce hard copies; that is why they sent hyperlinks. Defendants also claim they have rendered the portion of plaintiff's motion for conditional preclusion for failure to turn over certain documents moot by submitting the annotated application.

They also insist that a new deposition is not necessary because Chew was already deposed for over 10 hours and that many of the questions were repetitive. Defendants point to examples of what they believe were repetitive and unnecessary questions about city approval for AM.

In reply, plaintiff insists the opposition only confirms that there should be a preclusion order barring defendants' assertion that they obtained information in their application from City and State websites. Plaintiff points out defendants were supposed to identify specific portions of those websites instead of just sending hyperlinks.

Discussion

“It is well established that a trial court has broad discretion over the discovery process, and its determinations will not be set aside absent a clear showing of abuse of discretion” (*Rodney v City of New York*, 192 AD3d 606, 606, 144 NYS3d 705 [1st Dept 2021] [citations omitted]).

The issue, it seems, is that plaintiff is attempting to make defendants recreate how they prepared an application in 2015. The Court's order dated July 21, 2021 reflected the Court's frustration with the fact that defendants dumped a list of websites and told plaintiff to figure it out (NYSCEF Doc. No. 30). However, given defendants' opposition, this Court must also be mindful of the fact that it cannot order defendants to "create" documents for discovery.

The Court understands defendants' position that it cannot give what it does not have. The Court finds the annotated application, the best that defendant could do, to be sufficient. However, defendants will be given one last chance to supplement in the chance that they can find another document. Therefore, the Court grants the branch of the motion to compel and that seeks conditional preclusion – any document that is not produced at least three weeks before the deposition herein ordered or has not been produced already, or where the link is dead as of the date of production (so no document comes up), cannot be used on any motion or at trial. Moreover, any documents that are produced between now and three weeks before the deposition must be organized, bates stamped and indexed, and not just dumped on plaintiff's counsel.


The Court also finds that another deposition is appropriate. Defendants did not dispute that they belatedly turned over discovery; and, of course, they turned over the annotated application in response to the instant motion. Plaintiff is entitled to question defendants on documents they did not have prior to Chew's deposition, including the annotated application. That defendants disagree with the way the first deposition was taken is not a basis to deny this portion of the motion.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted, plaintiff is entitled to another deposition of defendant Mei Har Chew about the three categories of documents produced after

her previous deposition, including the annotated application, and about documents produced between today that three weeks before the deposition (but only if additional documents are organized, bates stamped and indexed), and this deposition must occur before March 16, 2022. Any document not already produced or produced at least three weeks before the Chew deposition cannot be used at trial or on any motion.

Remote Conference: April 4, 2022 (NYSCEF Doc. No. 34).

2/3/2022			
DATE			ARLENE BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE