

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

2022 NY Slip Op 30593(U)

February 23, 2022

Supreme Court, New York County

Docket Number: Index No. 655583/2016

Judge: Arlene 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

Defendant.

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INDEX NO. 655583/2016  
MOTION DATE 02/22/2022  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for STRIKE PORTIONS OF ERRATA SHEETS.

The motion by defendants to strike certain portions of the errata sheets for both of plaintiff's witnesses 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.

This motion concerns errata sheets submitted in connection with the depositions of plaintiff's witnesses (Marian Sheng and Jilin Yin). Defendants contend that the errata sheets contained wholesale changes to both witnesses' testimony and should be stricken. They focus on

categories of these errata sheets identified as “clarifications,” “correct mistakes,” and “correction” or mistake.” Defendants insist that these changes relate to the central issues in the case and are merely an attempt by these witnesses to further explain herself. They point out that at a follow up deposition for Ms. Sheng, she testified that she changed her testimony as did Mr. Yin.

In opposition, plaintiff argues that defendants agreed to resolve this issue by doing additional depositions of these witnesses and therefore defendants cannot make the instant motion. Plaintiff maintains that the errata sheets do not contradict the allegations in the complaint or change facts. Plaintiff insists that English is not the first language for either witness so they took the opportunity to review the transcripts of the depositions and make the appropriate corrections.

In reply, defendants dispute that the Court precluded them from making this motion in a prior discovery order and instead defendants were directed to make a motion by January 14, 2022. Defendants claim that they were unable to resolve the issue, as they had hoped, by holding another deposition of each witness.

### **Discussion**

As an initial matter, the Court finds that defendants were entitled to make the motion. The Court’s order from July 21, 2021 merely codified that the parties had agreed to hold further depositions of the witnesses regarding the changes in the errata sheets (NYSCEF Doc. No. 75). It did not preclude defendants from making a motion. In fact, in the subsequent discovery order, the Court noted that there remained a dispute about the errata sheets and directed the parties to make a motion by January 14, 2022 (NYSCEF Doc. No. 78). The instant motion was made on January 14, 2022.

CPLR 3116(a) provides that: The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.”

“[M]aterial or critical changes to testimony through the use of an errata sheet [are] . . . prohibited” (*Torres v Bd. of Educ. of City of New York*, 137 AD3d 1256, 1257, 29 NYS3d 396 [2d Dept 2016]). An errata sheet may be struck where “plaintiff made numerous substantive changes to the testimony without providing a sufficient explanation for them” (*Carrero v New York City Hous. Auth.*, 162 AD3d 566, 567, 75 NYS3d 419 (Mem) [1st Dept 2018]).

Here, the Court grants the motion. The Sheng errata sheet contains numerous instances in which changes identified as clarifications are used as opportunities to craft better answers and to change answers. That is not the purpose of an errata sheet. For instance, one answer is changed from “One day you can learn, two days you can learn” to “You can’t learn these through one or two days” (NYSCEF Doc. No. 39). Another was changed from “And in the last one is all these three people have—have the extended knowledge to start an agency” to “She used her position of assigned authority at Functional Life to her own benefit, that was to open her own agency, not only using the connections she made with Functional Life employees, but also using the training I gave her” (*id.*). It strains credulity to think these are appropriate changes. An errata sheet is not a chance to consult with one’s attorney and attempt to rewrite history.

Mr. Yin’s errata sheet is not as egregious but it contains similar drastic changes. One answer is changed from “No. She didn’t tell me” to “Yes. We have the evidence in the application and her own testimony; but, no she did not tell me” (NYSCEF Doc. No. 41) while another seeks to change an answer from “He cannot—she could not” to “She can” (*id.*).

The Court recognizes that plaintiff argues that these witnesses might struggle with the English language, although, if true, there is no explanation as to why an interpreter was not arranged. Of course, nothing prevents these witnesses from attempting to argue, either in a motion or at trial, that their testimony was not perfect due to a language barrier or even to expound on that answer. And the Court observes these witnesses had a chance at subsequent depositions to do exactly that: provide more context for their positions. A fact finder will be entitled to decide how to consider and whether to credit such testimony.

Obviously, a deposition transcript is not going to be perfect. But an errata sheet is not a chance to make wholesale changes to a deposition transcript that a party doesn’t like. It is not a license to change testimony to try and help make a party’s case.

Accordingly, it is hereby

ORDERED that the motion by defendants to strike all responses labeled as “clarification” or “correct mistake” in both the Sheng and Yin Errata Sheets<sup>1</sup> is granted.

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

ARLENE BLUTH, J.S.C.

<u>2/23/2022</u>			
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input checked="" type="checkbox"/>
			NON-FINAL DISPOSITION
			<input type="checkbox"/> GRANTED IN PART
			<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE

<sup>1</sup> This is the specific relief requested by defendants in its wherefore clause (NYSCEF Doc. No. 36 at 8).