

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

2023 NY Slip Op 32221(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 655583/2016

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. ARLENE P. BLUTH PART 14

Justice

-----X

FUNCTIONAL LIFE ACHIEVEMENT, INC.,
Plaintiff,

INDEX NO. 65583/2016

MOTION DATE N/A, N/A

MOTION SEQ. NO. 006 008

- v -

ASPIRING MUNCHKINS LLC, MEI HAR CHEW, QI GUO,
ELAINE CHING-YEE LO A.K.A. ELAINE CHING-YEE
CHOW,

Defendants.

-----X

MIA CHEW and ASPIRING MUNCHKINS, LLC
Counterclaim-plaintiffs

**DECISION + ORDER ON
MOTION**

-v-

MARIAN SHENG, JILIN YIN, YINSHENG FLUSHING LLC
Counterclaim-defendants

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 251

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 006 and 008 are consolidated for disposition.

Plaintiff’s motion (006) for partial summary judgment on its second, third, twelfth, thirteenth and fifteenth causes of action is denied and defendant’s cross-motion for summary judgment is denied. Defendants’ motion (MS008) for summary judgment to dismiss certain

causes of action is granted only to the extent that the seventh cause of action for fraud is severed and dismissed.

Background

Plaintiff operates an agency that provides services for infants and toddlers with disabilities under the New York State Early Intervention Program. It complains that its former clinical director, service coordinator, and another staff member used plaintiff's confidential and proprietary information to start a competing business, defendant Aspiring Munchkins, LLC (hereinafter "AM"). Plaintiff explains that defendant Chew was the clinical director and had full access to plaintiff's proprietary information.

Plaintiff's main complaint is that defendants, led by Chew, used their access to plaintiff's information and provider contacts to obtain a servicing contract from New York State to start their own competing business. It maintains that defendants did this mainly while working for plaintiff. Plaintiff explains that its most valuable asset is its providers. According to plaintiff, it devoted substantial time over the years to find and train early education service providers to provide services for children, including language skills required to ensure non-English speaking communities received these vital services. Plaintiff observes that information about their providers is kept in a locked box for which Chew had a key.

Plaintiff also argues that it developed policies and procedures to ensure that its services met City and State criteria to be an approved provider, including the development of quality assurance plans. Plaintiff contends that defendants copied these plans when creating their own policies and plans for AM. It emphasizes that defendant Chew worked for plaintiff starting in 2004 and that she was eventually promoted to Clinical Director in 2010.

Defendant Guo worked for plaintiff as a service coordinator starting in 2002 while defendant Chow (sometimes referred to as defendant Lo in the papers) was a physical therapy provider who began working for plaintiff (in an independent contractor role) in 2008.

Chew resigned from her position in November 2015 pursuant to a letter agreement (defendants insist that this agreement lacked consideration) and AM began operating several months later, in mid-2016.

MS006

In this motion, plaintiff seeks summary judgment on five of its sixteen causes of action.

Plaintiff contends that defendant Chew was entrusted with many management tasks for plaintiff and that, in her role, she had access to confidential and proprietary information. She was authorized to contact New York State on plaintiff's behalf. Plaintiff insists that Chew used plaintiff's property and facilities to prepare an application for AM. It maintains that the phone number listed on the application to form AM (the competing business) was a number affiliated with plaintiff, Chew responded to emails during normal work hours about the application, and that all but one of the seven employees and providers identified on the AM application worked for plaintiff.

Plaintiff argues, essentially, that defendants copied plaintiff's business model and the application for AM covered the same geographic areas, disciplines and language services provided by plaintiff. It maintains that Chew did not notify plaintiff about her efforts and even entered into a contract on behalf of AM while still working for plaintiff.

Defendants cross-move to dismiss the same causes of action as against Guo and Chow. Chew contends that plaintiff refused to let her become a service provider, despite the fact that she had obtained the necessary education to become a special education teacher. Chew insists

that she then explored starting her own agency with two friends who had worked for plaintiff (defendant Guo, who was a special education service provider and defendant Chow, who was a physical therapy provider).

She denies that the work for the application was done during work hours, but admits she may have contacted New York State employees during her lunch hour, the only time these individuals were available. Chew admits that AM's application to the state did identify some of plaintiff's service providers as potential AM employees or independent contractors but that these people did not ultimately come to work for AM. Chew argues that AM got approval to run an early intervention agency in April 2016, six months after she left her employment with plaintiff.

“An employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties. An employee may create a competing business prior to leaving her or his employer without breaching any fiduciary duty unless she or he makes improper use of the employer's time, facilities or proprietary secrets in doing so” (*Is. Sports Physical Therapy v Burns*, 84 AD3d 878, 878, 923 NYS2d 156 [2d Dept 2011] [internal quotations and citations omitted]).

The Court denies the motion and the cross-motion. On a motion for summary judgment, this Court cannot make credibility findings or findings of fact. And, here, plaintiff and defendants offer two differing versions of what occurred here. Plaintiff insists its former employee (defendant Chew) used her position as clinical director to start her own business. Chew claims she simply wanted more opportunity and decided to start her own business. There are many issues of fact that compel the denial of both the motion and cross-motion. As an initial matter there is an issue of fact about the confidentiality agreement and the extent to which Chew knew that plaintiff viewed its records as proprietary. Chew denied being told about

preserving plaintiff's business secrets or confidentiality (NYSCEF Doc. No. 194 at 28 [Chew depo]). And she testified that she never saw a confidentiality policy (*id.* at 80) and that she did not remember signing a confidentiality agreement (*id.* at 19). Plaintiff's COO claimed that Chew signed a confidentiality agreement (NYSCEF Doc. No. 176 at 196).

That there was an email sent by Chew regarding AM during work hours (NYSCEF Doc. No. 194 at 193-95) does not entitle plaintiff to summary judgment against Chew. It does not establish that Chew violated her duty of loyalty as a matter of law. A single email is not sufficient to find that Chew violated the duty of loyalty or any other duty to plaintiff.

Plaintiff's focus on the application drafted by Chew is understandable. But there are issues of fact with it as well. A fact finder must assess whether it was merely prospective (as defendants argue) or grounds for liability in plaintiff's favor. A jury could credit defendant's argument that because AM did not actually start operating until months after Chew left plaintiff, an application about what might happen in the future is not a basis to impose liability.

And the Court observes that there is no doubt that Chew worked for plaintiff for many, many years. She claims she wanted to start her own business and plaintiff did not submit anything, such as a non-compete agreement, that prevented that effort.¹ And there is a dispute about whether Chew actually signed a confidentiality agreement. Chew did not have to turn her brain off when starting AM. After all, plaintiff trained her and so it is reasonable to assume that she used her knowledge and experience. Whether she violated her obligation to plaintiff as part of her effort to start AM is a question for the jury.

¹ The Court recognizes that the Chew's resignation letter from November 2015 contains certain restrictions on Chew but does not specifically prohibit her from starting AM. And the Court makes no finding as to the enforceability of this letter in this decision (an issue discussed more below).

As defendants point out, to the extent that any individuals identified in the application were independent contractors for plaintiff, plaintiff's COO testified that independent contractors were permitted to work for entities other than plaintiff (NYSCEF Doc. No. 188 at 235). And Chew insists that the phone number on the application (which plaintiff highlights on the ground that it was a number affiliated with plaintiff) was her personal cell. Again, the Court cannot draw conclusions based on the numerous disputed facts.

The Court understands that plaintiff thought of Chew as part of its family; it paid for her education and likely feels betrayed. But plaintiff's theory requires this Court to view the facts as a whole and to ascribe motivations for those actions. There is no doubt that Chew came up with the idea for AM and submitted the application while she was working for plaintiff. Although that would make plaintiff unhappy, this record does not show that this conduct was prohibited as a matter of law. Without proof of a signed confidentiality agreement or something approaching a non-compete agreement, a fact finder must assess whether these actions entitle plaintiff to recover on these causes of action. An employee, even a long-time employee, is entitled to move on to new adventures as long as she doesn't breach any obligations to her old employer.

Similarly, the claims as alleged against Guo and Chow must also go to trial. Aiding and abetting a breach of a fiduciary duty requires that a plaintiff show "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach. A defendant knowingly participates in the breach of fiduciary duty when he or she provides "substantial assistance" to the fiduciary, which occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 25, 17 NYS3d 678 [1st Dept 2015] [internal quotations and citation omitted]).

Both of these defendants raised issues of fact for the reasons described above. The Court is unable to conclude that simply because defendants started their own agency and that they had previously worked for plaintiff (in some capacity) that they helped Chew violate her fiduciary duties. For instance, Guo testified that independent providers could work for multiple agencies at the same time (NYSCEF Doc. No. 145 at 72). While Guo worked for plaintiff as a staff employee at one time, Guo says she left in 2012 and was a part-time special education provider starting in 2014. And there is no evidence to show that Chow was required to work exclusively for plaintiff either.

In other words, there are numerous material issues of fact with respect to what confidential information Guo and Chow had access to and how, if they did, they may have used that information to start AM.

However, the Court declines to grant the branches of the cross-motion that seek summary judgment to dismiss the claims against these defendants. Plaintiff's account, if true, recounts a scheme to use plaintiff's resources built over many years to start a competing entity while all three individuals were receiving payments from plaintiff. And, at that time, Chew was the clinical director, meaning she was in a position where plaintiff claims she had access to all types of information that could be used to start a rival business at the expense of plaintiff.

MS008

In this motion, defendants want summary judgment dismissing plaintiff's causes of action numbered 1, 4, 5, 6, 7, 9, 10, 11 and 14. These are for breach of contract, for breach of confidentiality against Chew, conversion and misappropriation against all defendants, unjust enrichment, unfair competition, fraud against Chew, Guo and Chow, tortious interference with prospective business advantage against Chew, tortious interference with contract against AM,

tortious interference with contract against Guo and Chow, a constructive trust against all defendants.

As an initial matter, to the extent that defendants did not attach a copy of the pleadings in connection with this motion, the Court will overlook any such error because the pleadings are readily available in an e-filed case.

Breach of Contract

The first cause of action alleges that Chew violated both a confidentiality agreement and November 16, 2015 agreement with plaintiff.

Defendants claim that plaintiff never produced a signed confidentiality agreement and that the November 2015 letter lacked any consideration and is not enforceable, although Chew admits she signed it.

As an initial matter, whether Chew is bound by the terms of the November 2015 agreement is for a fact finder to assess. The Court cannot conclude, on a motion for summary judgment, that Chew can avoid the obligations of this letter agreement based on her assertion that she felt intimidated into signing it. The Court observes, however, that it makes no finding that there was valid consideration and defendants are entitled to raise arguments about this issue at trial. The Court merely finds it cannot make a conclusion as a matter of law on these papers.

The Court also declines to dismiss this claim to the extent it is based upon the confidentiality agreement. Plaintiff admits it does not have a copy of it but plaintiff's COO testified that she recalled that Chew signed a confidentiality agreement (NYSCEF Doc. No. 176 at 196).

Misappropriation, Unjust Enrichment, Unfair Competition,

The Court declines to dismiss these cause of action as well. As noted in great detail above, plaintiff's theory is that defendants used information gleaned from plaintiff to start their own business. Plaintiff insists that the information was confidential and defendants improperly used it to apply for and then operate their new business.

Fraud

The seventh cause of action pleads a fraud claim against Chew, Guo and Chow based upon their alleged intentional concealment in creating the new business.

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). “A fraud-based claim is duplicative of breach of a contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract” (*MMCT, LLC v JTR Coll. Point, LLC*, 122 AD3d 497, 499, 997 NYS2d 374 [1st Dept 2014] [internal quotations and citation omitted]).

The Court severs and dismisses this cause of action. Plaintiff did not raise a material issue of fact. It did not point to any documents, such as a non-compete provision, or any evidence that shows that any of the defendants had an obligation to disclose that they were planning to start AM. That Chew did not tell her employer that she was contemplating starting a rival business is not surprising, but there is no basis to find that it constituted fraud. And the Court finds no reason for why Guo or Chow were required to tell plaintiff.

To the extent that plaintiff contends that this cause of action is based upon allegedly misappropriated records, this claim is duplicative of numerous other causes of action, including

the misappropriation claim. Plaintiff did not meet its burden on this record to sufficiently show what misrepresentations were made by these defendants or that there was justifiable reliance by plaintiff based on those misrepresentations or omissions. Starting another competing business is not necessarily a fraud on someone's former employer.

Tortious Interference Claims (Claims 9, 10 and 11)

The Court declines to dismiss these causes of action. Plaintiff raised material issues of fact about defendants' efforts to take confidential and proprietary information to start their own business. As plaintiff explains, this entire business is built upon an agency's providers. That is, an agency must develop contacts with individuals who are qualified to provide services, such as physical therapy or special education services. And plaintiff says that defendants reached out to plaintiff's employees and independent contractors.

While defendants emphasize that the application for AM was only prospective, the inclusion of individuals associated with plaintiff on it (including Chew who indisputably still worked for plaintiff at the time) means that a fact finder must assess the significance, if any, of defendants' efforts to start a rival business.

Constructive Trust

The Court declines to dismiss this cause of action. As plaintiff explains, it is entitled to plead this cause of action even though it is a remedy (*see Kaiafas v Ammos NYC LLC*, 179 AD3d 416, 417, 113 NYS3d 535 [1st Dept 2020] [permitting leave to amend to add a cause of action for a constructive trust]).

The Court denies defendants' bizarre request for sanctions. That plaintiff made some procedural errors is not a basis to impose sanctions.

Summary


The parties’ voluminous submissions make clear that there are two divergent accounts of what happened here. Plaintiff insists that it saw Chew as a daughter, paid for her education and feels betrayed that she left to start her own rival agency. It thinks Chew used her access to confidential information and years of working for plaintiff to, essentially, clone plaintiff’s agency.

But defendants offer a different view. Chew says that she wanted a different role—to be a provider—and she became unsatisfied with her job at plaintiff. So, she decided to start her own agency. Without conclusive proof that Chew signed a confidentiality agreement and without any proof of a non-compete agreement barring her from starting her own agency, the Court is unable to find that defendants violated any obligations to plaintiff or that defendants caused plaintiff to suffer damages. A fact finder must make its own assessment of what occurred.

Accordingly, it is hereby

ORDERED that plaintiff’s motion (006) and defendants’ cross-motion are both denied in their entirety; and it is further

ORDERED that defendants’ motion (MS008) for summary judgment is granted only to the extent that the fraud claim is severed and dismissed.

<p><u>6/30/2023</u> DATE</p>			 <hr/> ARLENE P. 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"/> GRANTED IN PART	<input checked="" 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