

**Gaon Wellness Acupuncture Physical Therapy &  
Chiropractic PLLC v Kim Jiae Ae**

2023 NY Slip Op 32638(U)

July 27, 2023

Supreme Court, New York County

Docket Number: Index No. 452930/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

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GAON WELLNESS ACUPUNCTURE PHYSICAL THERAPY AND CHIROPRACTIC PLLC,

Plaintiff,

INDEX NO. 452930/2022

MOTION DATE 07/24/2023

MOTION SEQ. NO. 002

- v -

KIM JIAE AE, TAE HYOUNG LIM, TIMES SQUARE PHYSICAL THERAPY PC, PARK AVENUE PHYSICAL THERAPY PC, THL ACUPUNCTURE PC, K TOWN PHYSICAL THERAPY PC, JOONSUNG LEE PHYSICAL THERAPY PC

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

This action arises out of allegations that, inter alia, defendants Tae Young Lim ("Mr. Lim") and THL Acupuncture P.C., helped defendant Jesse Kim breach a non-compete agreement. Defendants, Mr. Lim and THL Acupuncture P.C., now move for summary judgment. Plaintiff opposes the instant motion. For the reasons set forth below defendants' motion for summary judgment is granted.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." Assaf v Ropog Cab Corp., 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. Alvarez v Prospect Hospital, 68 NY2d 320, 501 [1986]; Winegrad v New York University Medical Center, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a

motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Plaintiff's complaint contains three causes of action as against the moving defendants. The first cause of action in plaintiff's complaint against the movants alleges that they "aided and abetted" defendant Kim's alleged conversion of plaintiff's client lists.

In support of the motion the movant submit the affidavit of Mr. Lim and defendant Kim. The affidavits provide that Mr. Lim and defendant Kim do not work together and have no business relationships, other than both having been previously employed by plaintiff.

In opposition to the motion, plaintiff submits the affidavit of Young Jun Youn, managing member of plaintiff. Mr. Youn avers that based on Mr. Lim and defendant Kim's alleged access to plaintiff's clients and billing information, during their time with plaintiff and the fact that their respective companies share office space there are questions of fact with respect to the aiding and abetting claim. Further, plaintiff contends that production of the parties' respective client list is required to conclusively dispose of this issue.

"Aiding and abetting conversion requires the existence of a conversion by the primary tortfeasor, actual knowledge, and substantial assistance" (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 505 [1st Dept 2018]).

Here, the movants have provided un rebutted affidavits that conclusively establish that there was no substantial assistance to defendant Kim, even assuming there was an underlying conversion and knowledge of the same. The complaint and the affidavit submitted in opposition do not contain any factual allegations nor has plaintiff submitted any admissible evidence to rebut the movants prima facie showing. Accordingly, plaintiff's fourth cause of action as against the movants is dismissed.

The second cause of action alleged the movants, is plaintiff's fifth cause of action alleging breach of the covenant of good faith and fair dealing.

A claim for a breach of the covenant of good faith and fair dealing requires "a contractual obligation between the parties" (*Coleman v Kirby*, 201 AD3d 402, 403 [1st Dept 2022]).

Mr. Lim contends that he did not have a contract with plaintiff, thus this cause of action is not applicable. In opposition, plaintiff contends that discovery is necessary to determine whether a contract exists.

Here, the Court finds that plaintiff has failed to raise a triable issue of fact. Plaintiff alleges that a contract exists however fails to submit that contract. Accordingly, the fifth cause of action as against the movants is dismissed.

The third cause of action asserted against the movants is plaintiff's sixth cause of action for libel and slander.

To be successful on a defamation claim, a plaintiff must prove that defendant made "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Epifani v Johnson*, 65 AD3d 224, 233 [2009] [internal quotations and citations omitted]). The complaint must set forth the particular words allegedly constituting defamation, the time, place and manner in which the false statement was made and specify to whom it was made (CPLR 3016[a]; *id.*; *Dillon v City of New York*, 261 AD2d 34, 38 [1999]).

Here, the Court finds that neither plaintiff's complaint nor its affidavit in opposition sufficiently establishes a cause of action for libel or slander. Accordingly it is hereby

ORDERED that the complaint is dismissed in its entirety as to defendants Tae Young Lim and THL Acupuncture P.C.; and it is further

ORDERED that the action is severed and continued against the remaining respondents; and it is further

ORDERED that the caption be amended to reflect the severance and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

ORDERED that the Clerk is directed to enter judgment accordingly.

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7/27/2023  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: