

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

2024 NY Slip Op 30689(U)

March 5, 2024

Supreme Court, New York County

Docket Number: Index No. 452930/2022

Judge: Lyle E. Frank

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. LYLE E. FRANK PART 11M

Justice

-----X

GAON WELLNESS ACUPUNCTURE PHYSICAL THERAPY AND CHIROPRACTIC PLLC,

Plaintiff,

INDEX NO. 452930/2022

MOTION DATE 11/20/2023

MOTION SEQ. NO. 004

- 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

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

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

This action arises out of allegations that, inter alia, that defendant Jesse Kim breached a non-compete employment agreement. Defendants, Jessie Kim, Times Square Physical Therapy P.C., Park Avenue Physical Therapy P.C. and KTown Physical Therapy P.C. now move for summary judgment. Plaintiff opposes the motion. For the reasons set forth below, the motion is granted in part.

Undisputed Facts

In November 2018, plaintiff was created by Young Jun Youn, defendant Kim and non-party Jamel Kurtlan Romeo. Defendant Kim had a 1 percent membership interest in plaintiff, while Mr. Youn maintained a 98 percent membership interest. According to the Articles of Organization, each member has their own profession license, Mr. Youn, acupuncture, Ms. Kim, physical therapy, and Mr. Romeo, chiropractor. See NYSCEF Doc. 104.

Before, during and after the creation of plaintiff, defendant Kim was working for other physical therapy clinics. Specifically, Ms. Kim created KTown, after the formation of plaintiff, and maintained that office in the same building different floor, as plaintiff. Notably, at the time plaintiff was founded, defendant Kim was the owner of a physical therapy provider and leased space from Mr. Youn's company at a different location.

The alleged employment agreement was executed by the parties on September 2, 2019. In August 2021, defendant Kim separated from plaintiff.

Standard of Review

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.

It is well established that courts may look to extrinsic evidence to resolve inconsistencies or ambiguity in a contract (*Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516, 518 [1st Dept 2010]). A contract is unenforceable when there is no meeting of the minds (*D'Artagnan v Sprinklr Inc.*, 192 AD3d 475, 477 [1st Dept 2021]). To find that there is no meeting of the minds the First Department has held that the material terms of the contract must

be “so obscure and ambiguous that it is impossible to ascertain” the intentions of the parties. *Id* (citations omitted).

Discussion

Preliminarily, the Court finds that defendant Kim has established that the contract is unenforceable. The Court does not reach the issue of whether Ms. Kim was an employee. The plain language of the contract and the undisputed facts clearly establish that there was no meeting of the minds thus the terms of the contract are not enforceable.

First, the execution of the contract occurred when, according to the non-compete provisions, the defendant had already breached. In fact, as the Court noted above, it is undisputed that defendant Kim was already engaged in providing physical therapy services and opened a physical therapy clinic at the same location as plaintiff 6 months before the execution of the contract. Moreover, the contract provides that defendant Kim is not to provide competing acupuncture services. Even giving the contract all favorable inferences to plaintiff, that despite the repeated references to acupuncture services, the parties understood that term actually meant physical therapy; as indicated above, the Court cannot reconcile the non-compete provision with the undisputed facts, as confirmed by Mr. Youn’s affidavit in opposition to the motion, that defendant Kim’s performance of physical therapy for other clinics was well known.

As to plaintiff’s third cause of action for conversion, defendant Kim has failed to establish a prima facie entitlement to judgment as a matter of law. In support of its motions, defendant contends that it cannot be said that she had dominion and control over plaintiff’s clients; however, she does not submit admissible evidence to establish that she did not have access to plaintiff’s confidential client information and use the same for her private practices. Accordingly, plaintiff’s third cause of action for conversion survives the instant motion.

As to plaintiff’s fourth cause of action for aiding and abetting conversion, the complaint fails to state a cause of action. Further, plaintiff’s affidavit in opposition does not allege any factual support for this cause of action. Accordingly, the fourth cause of action is dismissed in its entirety.

Further, defendants have established entitlement to dismissal as a matter of law of plaintiff’s sixth cause of action alleging libel and slander. As this Court has previously determined in a prior decision and order, the complaint is devoid of the required specificity to state a viable claim.

In opposition to the motion, plaintiff alleges that discovery is required, and summary judgment is not appropriate at this time. Plaintiff fails to identify any information that is solely in defendants’ possession that requires denial of the instant motion. The Court has reviewed the parties remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that defendants’ motion for summary judgment is granted in part in that plaintiff’s first, second, fourth and sixth causes of action are dismissed.

20240305102043LFRANKAC2E71AC64641F7873DF181F620EF3C

3/5/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE