

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4  
Justice

\_\_\_\_\_<sup>x</sup>  
GOLDEN TOUCH TRANSPORTATION OF  
NY, INC.,

Plaintiff(s)

-against-

G.E.H.S TRANSPORTATION, INC.,  
GIOVANNI HERNANDEZ, and GIO'S TRAVEL  
INC.

Defendant(s)

\_\_\_\_\_<sup>x</sup>

Index  
Number 23990 2010  
  
Motion  
Date December 21, 2010  
  
Motion  
Cal. Number 16  
  
Motion Seq. No. 3

The following papers numbered 1 to 9 read on this motion by defendants GEHS Transportation, Inc. (GEHS), Giovanni Hernandez, and Gio's Travel, Inc. pursuant to CPLR 7503(a) staying this action on the ground that all of the claims alleged in the complaint are subject to arbitration, or in the alternative an order pursuant to CPLR 2004 extending and resetting the dates sets forth in the Preliminary Conference Order.

	<u>Papers</u> <u>Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-7
Reply Affidavits.....	8-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

The plaintiff Golden Touch Transportation of New York (Golden touch) operates a ground transportation dispatch service in the metropolitan area, primarily providing service at airports. Golden Touch sells franchises to companies which receive the right to transport customers for a commission. Although the franchisees supply their own buses and workers,

their vehicles and workers bear the franchisor's markings. Defendant GEHS owned by Giovanni Hernandez Sr., purchased five franchises from Golden Touch between 2000 and 2009. The first four franchises followed identical forms and had a choice of law provision specifying New York law. They contained identical arbitration provisions which stated that all claims would be resolved in binding arbitration except for "any claim brought by the company to enforce a non-competition agreement." The fifth agreement had a Delaware choice of law provision and had an arbitration clause which only excepted "any action in any court of competent jurisdiction for injunctive or extraordinary relief." The plaintiff has indicated in its papers that it is only suing under the New York franchise agreements.

On December 17, 2009, Golden Touch terminated the five franchise agreements. Golden Touch then brought suit on September 22, 2010, for violating the non-compete provision of the franchise agreements. The plaintiff moved for a preliminary injunction, which was denied by this Court. The defendants have now moved to stay the action and compel arbitration. In an order dated April 5, 2011, the motion was granted to extent that a conference was scheduled and held on April 18, 2011. The parties were thereafter given additional time to submit supplemental Memorandum's of Law.

It is for the court in the first instance to determine whether the parties have agreed to submit their disputes to arbitration and, if so, whether the disputes come within the scope of their arbitration agreements (*Sisters of St. John the Baptist v Phillips R. Geraghty Construtor, Inc.*, 67 NY2d 997 [1986]). Here, the four New York franchise agreements specifically excluded from arbitration "any claim...to enforce a non-competition agreement." The claims brought by the plaintiff are for violations of the non-compete clause and therefore fall outside the scope of the arbitration provision. The argument put forth by the defendants that the language permitting court action to enforce only pertains to actions for injunctions is not sustainable. While the plaintiff sought and was denied a preliminary injunction it also seeks money damages for breach of the non-compete clause. The legal remedy for the enforcement of a contract is money damages (*see Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175 [1990]). Therefore, an action for a breach of a non-compete clause of a contract is a claim to enforce the non-compete clause and is specifically excluded from arbitration.

The defendants further argue that the Delaware Franchise agreement supersedes the earlier New York agreements. This argument is without merit. Contracts are separate unless their history and subject matter show them to be unified (*131 Heartland Blvd. Corp. v C.J. Jon Corp.*, 82 AD3d 1188 [2011]; *Nancy Neale Enters. v Eventful Enters.*, 260 AD2d 453 [1999]). Here, each agreement granted a separate franchise and the Delaware agreement did not mention or modify the earlier franchises. In fact, the plaintiff has stated in its papers in opposition to this motion that it is suing for violations of the New York Franchise agreements rather than the Delaware Franchise. Therefore, the fact that the plaintiff has stated that it is

not suing under the Delaware franchise and its claims are limited to breaches of the New York franchise agreements, it cannot be forced to arbitrate based on the arbitration clause in the Delaware agreement. Therefore, the motion to compel arbitration and stay this action is denied.

Defendants argument that this action should be stayed pending arbitration of the Delaware franchise agreement is without merit. First, no claims under the Delaware franchise have been brought and there is no arbitration pending for any claims arising out of that agreement. Furthermore, in light of the fact that each franchise agreement is a separate agreement for a separate franchise, staying this action is not warranted (*cf. Anderson St. Realty Corp. v New Rochelle Revitalization, LLC, 78 AD3d 972 [2010]*).

As to the branch of the motion to extend the time to answer the complaint and to reset the dates of discovery, this branch of the motion is granted. In light of the pending motion to stay the action and to compel arbitration, the defendants did not serve an answer. Therefore, good cause exists to extend the time for the defendants to file and serve an answer (CPLR 2004). Additionally, the discovery schedule made at the preliminary conference was made prior to the filing of this motion and pending the determination of this motion there were discovery demands that became due. Thus, a new discovery schedule must be established.

Accordingly, the branch of the defendants' motion for an order staying this action and compelling arbitration is denied.

The branch of the defendants' motion to extend the time to answer the complaint is granted and the defendants time to answer is extended to twenty (20) days from service of a copy of this order with notice of entry.

Dated: November 21, 2011

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J.S.C.