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INTERIM ORDER

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60
Justice

FORTUNE FRANCISE

- v -

KLEIN, HOWARD

INDEX NO. #601693-2006
MOTION DATE
MOTION SEQ. NO #001
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Defendant's Cross-Motion is DENIED in accordance with the accompanying decision.

SO ORDERED

FILED
SEP 12 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/8/06

J.S.C. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST [ ] REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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F-O-R-T-U-N-E FRANCHISE CORPORATION,

Plaintiff,

Index No. 601693/2006

-against-

HOWARD G. KLEIN and JEMEL CONSULTING INC. d/b/a F-O-R-T-U-N-E PERSONNEL CONSULTANTS OF BERGEN COUNTY, INC.,

Defendants.

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Appearances:

For Plaintiff:

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT, LLP
By: Jamie B.W. Stecher, Esq.
Andrew Singer, Esq.

For Defendants:

DAVID J. PANITZ, ESQ.
50 Main Street, Suite 4
Hackensack, NJ 07601

FRIED, J.:

Defendants cross-move for an order disqualifying Joel A. Klarreich, Esq. ("Klarreich"), and his firm, Tannenbaum Helperin Syracuse & Hirschtritt LLP, from continuing to serve as Plaintiff's counsel in this action, pursuant to DR 5-108 of the Code of Professional Responsibility (22 N.Y.C.R.R. § 1200.27). For the reasons that follow, I deny Defendants' motion for disqualification.

Plaintiff F-O-R-T-U-N-E Franchise Corporation ("F-O-R-T-U-N-E") is a New York corporation that, since 1967, has franchised businesses operating under the "F-O-R-T-U-N-E Personnel Consultants" and "FPC" trade names and service marks. Franchisees specialize

in placing professional, executive, and middle management personnel with employers, who are clients of the franchisees. Currently, 71 such F-O-R-T-U-N-E franchises are in operation throughout the United States and Canada. In July 1989, Defendants Howard J. Klein ("Klein") and Jemel Consulting Inc. d/b/a F-O-R-T-U-N-E Personnel Consultants of Bergen County, Inc. ("Jemel") entered into a franchise agreement ("the Franchise Agreement") with Plaintiff to operate a F-O-R-T-U-N-E franchise.[1]

In late February 2005 or early March 2005, Defendants contacted Plaintiff to discuss the renewal terms of the Franchise Agreement.[2] Despite an approximately year-long series of discussions between the parties, they were unable to agree on a satisfactory arrangement. They dispute whether they agreed upon an extension of the period in which Defendants could notify F-O-R-T-U-N-E of an intent not to renew the Franchise Agreement.

On May 12, 2006, Plaintiff brought this action by motion for an Order to Show Cause, alleging that Defendants failed to notify F-O-R-T-U-N-E by registered mail of an intent not to renew the Franchise Agreement during the permissible time period for doing so. (Compl. ¶¶ 15-16 (May 12, 2006) ("Compl.").) The complaint alleges that the Franchise Agreement was automatically renewed for a second 20-year term, ending May 14, 2026, pursuant to the terms of the Franchise Agreement (Compl. ¶¶ 18-21).

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[1] Defendants assumed the rights and obligations of the Franchise Agreement from Steven A. Roberts, a non-party, who originally entered into the Franchise Agreement with Plaintiff on May 14, 1986. Defendants assumed these rights and obligations pursuant to an assignment and assumption agreement with Roberts, through which they guaranteed "the performance and obligations of the Assignee to the Licensor under the Agreement and agree[d] to be bound by all of the terms and conditions thereof."

[2] The Franchise Agreement's initial term was scheduled to end on May 14, 2006 and was automatically renewable for 20-year terms thereafter. The Franchise Agreement also contained non-competition covenants and geographic restraints, in the event Defendants left the F-O-R-T-U-N-E network.

On May 12, 2006, Defendants cross-moved for an Order to Show Cause, seeking disqualification of Klarreich and his law firm and compensatory, consequential, and incidental damages. Defendants supported the motion for disqualification with an affidavit of Defendant Klein, dated May 12, 2006, in which Klein averred that Klarreich had "essentially functioned as my attorney in the [franchise] network, providing advice and guidance on numerous matters pertaining to my franchise business," for a period of 17 years. (Aff. Howard Klein ¶ 7 (May 12, 2006).)

Klarreich responded with an affidavit dated May 15, 2006, stating that, during the 17-year period in which Defendants had operated their franchise, Klarreich "never discussed with Defendants any issues regarding Defendants' relationship with Plaintiff," nor did he discuss with Plaintiff "the Franchise Agreement at issue in this case, its provisions, or the issue of its renewal." (Aff. Joel A. Klarreich ¶¶ 7-9 (May 15, 2006).) Klarreich added that he never "represented Defendants in the same or any substantially related matter to the case at bar" and never "acquired any confidences or secrets of Defendants during any of the infrequent Conference Calls or otherwise, because all of the Conference Calls were non-privileged or dealt with information already known to Plaintiff." (*Id.* at ¶¶ 13-14).

On May 12, 2006, I granted a temporary restraining order until May 15, 2006. At oral argument on May 15, 2006, counsel for Defendants consented to an extension of the TRO until June 2, 2006. The parties also agreed on May 15, 2006, to enter outside mediation. Mediation efforts were unsuccessful.

On June 2, 2006, I held an evidentiary hearing on Defendants' motion to disqualify Klarreich and his firm from representing F-O-R-T-U-N-E. At the hearing, Defendant Klein

testified that his communications with Klarreich occurred "[m]ostly over the phone" and occasionally "at conferences," which were "[n]ational conferences that franchis[o]r would hold and franchisees would attend." (Trans. 11:15-12:6). He further testified that the matters he discussed with Klarreich pertained to "[c]andidates that we were trying to place, and their employment agreements with my employees," as well as "other issues surrounding my employment agreements with my employees." (Trans. 13:12-13:16). This interaction with Klarreich took three forms: (1) discussions during public question-and-answer forums at F-O-R-T-U-N-E conferences, (2) private side discussions at F-O-R-T-U-N-E conferences, and (3) telephone conversations (Trans. 12:8-14:26).

Specifically, Klein testified that his conversations with Klarreich "at the conferences in a general forum...were more related to not specific instances in our contracts or specific instances with our employees, but just in general to these subjects." (Trans. 16:4-16:8). The "specific conferences we have had on the sides...[and] telephone conferences...related more specifically to issues I, as a franchisee, had with employees, with candidates, with clients." (Trans. 16:9-16:15).

Klarreich has served as Plaintiff's attorney since 1971, except for a brief period when Klarreich was not engaged in the practice of law. In this capacity, Klarreich has prepared form agreements for Plaintiff and has lectured at the F-O-R-T-U-N-E annual conferences. In addition, Klarreich occasionally provides counsel to franchisees on matters related to the operation of their franchise businesses, including the placement of job candidates and the terms of candidates' employment agreements.

Typically, however, franchisees first approach Plaintiff with questions regarding relations with their employees, job applicants, or clients, and Plaintiff attempt to resolve the matters without the aid of counsel. If unable to do so, Plaintiff would contact Klarreich regarding franchisee inquiries, and if appropriate, Plaintiff would then arrange a conference call with Klarreich, a F-O-R-T-U-N-E staff member, and the franchisee. At the hearing, Klarreich explained:

> When a franchisee called the franchis[o]r, if there was a problem that the franchis[o]r thought that I should become involved in, they would call me, they would discuss the issue...Sometimes I would give them information that they would transmit back to the franchisee and at times, sometimes they would arrange a conference call between a representative of F-O-R-T-U-N-E and the particular franchisee to discuss the particular issue.

(Transcript 60:11-60:19 (June 2, 2006) ("Trans.").) It is Plaintiff's policy that a F-O-R-T-U-N-E staff member be present during conference calls.

Klarreich testified that he "never spoke to [Defendant] Klein about his specific franchise agreement with the Plaintiff." (Trans. 57:25-57-26). This was corroborated by Klein, who testified that Klarreich never advised him on his Franchise Agreement with Plaintiff. Indeed, when asked whether he "discussed the Franchise Agreement for [his] franchise with Mr. Klarreich," Klein answered, "[t]his specific agreement, no." (Trans. 41:6-41:8). Klarreich further testified that over the 10 year period, he spoke to Mr. Klein between 2 to 10 times. Id.

Regarding the motion for disqualification, Klein must establish, as a basis for disqualification of Klarreich: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both

representations are substantially related, and (3) that the interests of the present client and former client are materially adverse." *Tekni-Plex Inc. v. Maynee & Landis*, 89 N.Y.2d 123, 131 (1996).

The parties do not dispute that a prior attorney-client relationship between Plaintiff and Defendants exists, and that the interests of Plaintiff and Defendants are materially adverse. Thus, the question of disqualification turns on whether the present and earlier matters involved in both representations are substantially related. *See* Code of Professional Responsibility DR 5-108 (22 N.Y.C.R.R. § 1200.27 (A) (1)).

Defendants argue that Klarreich and his firm have provided counsel to them for several years regarding Defendants' franchise operation, and that the prior matters for which Klarreich provided counsel during this time are substantially related to the current dispute arising from Defendants' Franchise Agreement with Plaintiff. Klein asserted that he discussed with Klarreich:

> [A] number of subjects relating to confidential information and trade secrets as it pertained to candidates of ours...Candidates that we were trying to place, and their employment agreements, as it pertained to my own employment agreements with my employees...such as restrictive covenants. We had a lengthy discussion, at one point regarding restrictive covenants, and because of advice he gave me I changed my employment agreement with my employees to remove that, because he told me it was not enforceable.

(Trans. 13:8-13:24). Based on these conversations concerning franchises, Defendants contend that a substantial relationship exists between Klarreich's prior and current representations, because both involve restrictive covenants.

However, the dispute in this action arises solely out the restrictive covenants within the Franchise Agreement between Plaintiff and Defendants, whereas Klarreich's prior representation involved matters regarding the restrictive covenants in the employment agreements of third-party job candidates. During Klein's telephone conversations with Klarreich, Klarreich provided advice to Defendants regarding relationships with (1) the franchise's employees, (2) job applicants whom Defendants attempted to place with employers, and (3) client companies for whom Defendants provided employee placement services. It is undisputed that on those occasions Klarreich never advised Klein on matters involving his own Franchise Agreement which is at issue here.

The Code of Professional Responsibility does not prohibit attorneys from representing current clients in litigation against former clients under all circumstances. *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 636 (1998). Rather, the Code imposes on attorneys an ongoing obligation to protect client secrets and confidences. *See Tekni-Plex, Inc.* 89 N.Y.2d at 131, *Solow v. Grace & Co.*, 83 N.Y.2d 303, 306 (1994). Furthermore, the Code "precludes attorneys from representing interests adverse to a former client on matters substantially related to the prior representation." *Tekni-Plex*, 89 N.Y.2d at 130. The latter proscription, which is relevant here, is set forth in DR 5-108 (A) (1), which states:

> A. Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

22 N.Y.C.R.R. § 1200.27(A) (1).

Disqualification cases present substantially different and competing interests, and, as such, "[d]isqualification of counsel conflicts with the general public policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." *See Tekni-Plex*, 89 N.Y.2d at 131; *S & S Hotel Ventures Ltd. P'ship v. 777 S. H. Corp.*, 69 N.Y.2d 437, 443 (1987). Therefore, in determining whether a moving party has established a basis for disqualification of counsel, "courts should avoid mechanical application of blanket rules," and instead should consider carefully the interests of those involved. *Tekni-Plex*, 89 N.Y.2d at 132.

It is undisputed that Klarreich never advised or provided legal counsel concerning the Franchise Agreement, which is the subject of this action. Thus, while Klarreich may have provided counsel to Defendants on approximately 2 to 10 occasions over the course of 10 to 12 years on matters involving restrictive covenants, Defendants failed to show that Klarreich's prior representation on those occasions was substantially, or in any way, related to his current representation.

Accordingly, inasmuch as there is a complete lack of evidence demonstrating a substantial relationship between Klarreich's prior and current representations, there is no violation of DR 5-108. Although Klarreich previously provided counsel to Defendants regarding their franchise business, "[k]nowledge of a former client's business background is not a basis for disqualification if that background is not an issue in the subsequent litigation." *Bank of Tokyo Trust Co. v. Urban Food Malls Ltd.*, 229 A.D.2d 14, 30 (1st Dept. 1996).

Thus, the prior representation of defendants does not bar Klarreich's and his firm for representing of Plaintiff in this action, and disqualification is not required.

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion to disqualify Joel A. Klarreich, Esq., and the law firm of Tannenbaum Helperin Syracuse & Hirschtritt LLP from representing Plaintiff in this action is DENIED; and it is further

ORDERED that the temporary restraining order will remain in effect until the preliminary injunction hearing.

Dated: 9/8/06

ENTER:

J.S.C.

FILED

SEP 12 2006

COUNTY CLERK'S OFFICE
NEW YORK