Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice — IA Part 14

DREAM TRANSPORTATION, INC. x

- against -

GOLDEN TOUCH TRANSPORTATION, etc. x

Index Number 1163 2005

Motion Date September 25, 2007

Motion Cal. Number 14

Motion Seq. No. 1

The following papers numbered 1 to 13 read on this motion by plaintiff for an order (1) disqualifying Fox, Horan & Camerini, LLP as counsel for defendant Golden Touch Transportation of NY, Inc., (2) striking the answer of Golden Touch Transportation, a/k/a Golden Touch Transportation of NY, Inc., pursuant to CPLR 3126 for failure to provide outstanding discovery; and in the alternative, (3) for an order compelling the defendant to provide outstanding discovery pursuant to CPLR 3124.

	Papers Numbered
Notice of Motion- Affirmations-Affidavit - Exhibits (1-29)	1-5
Opposing Affidavit - Affirmations - Exhibits (A,1)	6-11
Reply Affirmation	12-13

Upon the foregoing papers this motion is decided as follows:

Defendant Golden Touch Transportation, Inc., a/k/a Golden Touch Transportation of NY, Inc., is represented in this action by the law firm of Fox Horan & Camerini, LLP. Plaintiff now seeks to disqualify defendant's counsel on the grounds that this law firm represented both plaintiff and defendant in the purchase of the franchises at issue, and represented plaintiff in the sale of

other franchises to third parties, which are not the subject of this litigation.

The Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients. Rather, DR 5-108 sets out two prohibitions on attorney conduct relating to former clients. First, an attorney may not 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" (Code of Professional Responsibility DR 5-108[A][1]; 22 NYCRR 1200.27[a][1]). Second, an attorney may not use "any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known" (Code of Professional Responsibility DR 5-108[A][2]; 22 NYCRR 1200.27[a][2]).

A party seeking disqualification of its adversary's lawyer pursuant to DR 5-108(A)(1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only "where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise" (Jamaica Pub. Serv. Co. v AIU Ins. Co., 92 NY2d 631, 637 [1998], quoting Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 132 [1996]; Solow v Grace & Co., 83 NY2d 303 [1994]).

The rule is clear that an attorney-client relationship arises only when a client contracts with an attorney for the purpose of obtaining legal advice or services (see Matter of Priest v Hennessy, 51 NY2d 62, 68-69 [1980]). Furthermore, since formality is not essential to the formation of the contract, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed (see Kubin v Miller, 801 F Supp 1101, 1115 [1992]). However, while an attorney-client relationship may arise from the words and actions of the parties, plaintiff's unilateral beliefs and actions do not confer upon him or her the status of a client (see Wei Cheng Chang v Pi, 288 AD2d 378 [2001]; Volpe v Canfield, 237 AD2d 282 [1997]; Solondz v Barash, 225 AD2d 996, 998 [1996]; Jane Street Co. v Rosenberg & Estis, P.C., 192 AD2d 451 [1993]). To establish an attorney-client relationship it "is fundamental that an explicit undertaking to perform a specific task is required" Sucese v Kirsch, 199 AD2d 718, 719 [1993]).

In determining whether an attorney-client relationship exists, courts have considered, among other things, (1) whether a fee arrangement was entered into or a fee paid; (2) whether a written contract or retainer agreement exists indicating that the attorney accepted representation; (3) whether there was an informal relationship whereby the attorney performed legal services gratuitously; (4) whether the attorney actually represented the individual in one aspect of the matter; (5) whether the attorney excluded the individual from some aspect of a litigation in order to protect another client's interest; and (6) whether the individual reasonably believed that the attorney was representing him or her (see First Hawaiian Bank v Russell & Volkening, Inc., 861 F Supp 233, 238 [1994]).

Applying these factors, the court finds that defendant has sufficiently demonstrated that no attorney-client relationship existed between plaintiff and the law firm of Baden Kramer Huffman & Brodsky, P.C. (Baden Kramer), or the law firm of Fox Horan & Camerini, LLP (Fox Horan), and that plaintiff has failed to present any triable issue of fact that it existed.

No fee arrangement was ever entered into between plaintiff and Fox Horan, and the only fee that was payable directly to this law firm was made pursuant to the contracts of sale between Dream and the third party purchasers of the franchises. Said contracts of sale provided that the closings were to be held "at the office of the Corporation's [Golden NY] attorney's Fox Horan ...," and that the "*Seller/Purchaser* shall, at the closing, pay (i) the processing fee and transfer fee of $3,5000.00 charged by the Corporation in connection with the approval of this sale and the transfer of the Franchise; and (ii) the $250.00 legal fee of the Corporation's attorney in connection with such transfer." As said contract makes clear, Fox Horan represented the franchisor, and either the seller or purchaser of the franchise was responsible for payment of the $250 legal fee incurred by the franchisor, in connection with the third party sale.

Plaintiff never entered into a retainer agreement with Fox Horan regarding legal services, or any other law firm, as regards the purchase or sale of the subject franchises. Similarly, there was no informal agreement between Dream and Fox Horan whereby counsel would gratuitously perform legal services for Dream. Plaintiff alleges that Wayne Baden drafted the documents pertaining to the franchises during the time Baden was associated with Baden Kramer and later when he was associated with Fox Horan. Mr. Baden states in his affidavit that the defendant franchisor was his client and that plaintiff was never

his client. There is no evidence that Mr. Rosales or any other representative of Dream ever spoke with, met, or communicated with Mr. Baden. Nor is there any evidence that Dream requested that any other attorney at Fox Horan represent it in any of the transactions involving the purchase or sale of the franchises.

There is no evidence that Fox Horan ever represented Dream in any aspect of the litigation matter and there is no evidence that Fox Horan ever excluded Dream from any aspect of the litigation so as to protect another client's interest. Rather, Fox Horan never excluded or included Dream from any aspect of the litigation and never considered the impact of its decisions upon Dream because Fox Horan was not Dream's attorney and, therefore, had no obligation to act on Dream's behalf.

Mr. Rosales, the former president and sole shareholder of Dream, states in his affidavit that he believed that Fox Horan was representing Dream, based upon conversations he had with unidentified attorneys at Fox Horan's offices where he appeared for the third party closings. Mr. Rosales does not state the substance of these conversations or set forth the nature of the legal advice he claims to have received. However, the simple act of an attorney giving advice to an individual does not automatically create an attorney-client relationship (see M.J. Woods, Inc. v Conopco, Inc., 271 F Supp 2d 576, 585 [2003]). It is undisputed that at the third party closings Mr. Rosales met with Greta Jernstedt, a paralegal, who conducted the closings on behalf of the franchisor. Ms. Jernstedt states in her affidavit that she gave Mr. Rosales her business card which clearly identifies her as a legal assistant. There is no evidence that Ms. Jernstedt held herself out as an attorney or did anything to lead Mr. Rosales to belief that she was an attorney.

Finally, Mr. Rosales does not deny that at each closing for the sale of the franchises to a third party, he signed letters stating that he "acknowledged and agreed that your firm [Fox Horan] has handled certain documentation of this transaction solely on behalf of the Corporation [Golden NY] and that your firm has not represented the undersigned in this transaction. However, your firm has assisted me in completing certain form transfer documents which embody the agreement that I have reached. I acknowledge that you have made no representations as to the adequacy of said form documents. I understand that I may obtain legal counsel and that you have urged me to retain my own attorney, in this matter or I have already done so. If I have not already retained my own attorney, I have chosen not to do so, and have elected to proceed without counsel. I further acknowledge

that you have not provided me with any legal advice or representation." In addition, at one closing both the seller, Mr. Rosales, and the purchaser signed a letter setting forth similiar acknowledgment and understanding as to the status of Fox Horan in the transaction. A party is under an obligation to read a document before he or she signs it. Mr. Rosales' present assertions that he does not recall reading these letters, or understanding their context or meaning, and does not recall Fox Horan urging him to obtain different counsel or informing him that the closing could be adjourned for that purpose, is insufficient to establish the existence of an attorney-client relationship.

Turning now to that branch of plaintiff's motion which seeks to strike the defendant's answer, this request is based largely upon defense counsel's failure to comply with plaintiff's request that it withdraw as counsel. Since plaintiff's request is based upon an unfounded belief in a prior attorney-client relationship, it cannot form a basis for the severe penalty of striking a pleading. To the extent that plaintiff asserts that defendant failed to comply with a May 21, 2007 notice for discovery and inspection, this demand was served after the compliance conference order of February 27, 2007, which provides, in pertinent part, that "ORDERED that disclosure demands now known to be necessary which are not raised at this conference are deemed to be waived." Said order only made explicit reference to the defendant's discovery demands. Since plaintiff failed to appear at the compliance conference, none of its prior discovery demands were included in the February 27, 2007 order. Plaintiff did not seek relief from its default in appearing at the compliance conference. Therefore, plaintiff's outstanding prior discovery demands are deemed to have been waived. Plaintiff may not avoid the consequences of the February 27, 2007 order by serving a new demand for discovery and inspection. Plaintiff's request to strike the defendant's answer or, in the alternative, to compel defendant to comply with the May 21, 2007 demand for discovery and inspection, therefore, is denied.

In view of the foregoing, plaintiff's motion is denied in its entirety.

Dated: November 28, 2007

J.S.C.