

**Direct Quick Trucking, Inc. v NY Minute Messenger,  
Inc.**

2010 NY Slip Op 30031(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 603109-2009

Judge: Judith J. Gische

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SCANNED ON 1/11/2010  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE  
**JUDITH J. GISCHE, J.S.C.** Justice

PART 10

DIRECT QUICK TRUCKING  
- v - DNC

INDEX NO. 603109/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

NY MINUTE MESSENGER DNC

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

JAN 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

NOTICE TO APPEAR WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

PC scheduled 2/18/2010 in  
Part 10

JAN 05 2010

Dated: \_\_\_\_\_

JG  
**JUDITH J. GISCHE, J.S.C.** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X,  
Direct Quick Trucking, Inc. and  
Narinder Pal Singh Chadha,

Plaintiff (s),

**-against-**

NY Minute Messenger, Inc.,

Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 603109-2009  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Plt's OSC (CPLR 6301) w/LPW affirm, summons & complaint	1
Def NYMM opp w/NDO affirm, answer, exha	2
Plt's reply w/LPW affirm	3

**FILED**  
JAN 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
*Upon the foregoing papers, the decision and order of the court is as follows:*

Gische J.;

This is an action for a declaratory judgment that the defendant NY Minute Messenger, Inc. ("NY Minute") does not have the right to hire its own attorney to represent NY Minute in separate action against it by the New York State Urban Development Corp. ("UDC") because of an indemnification provision in a purchase agreement between the parties to the action at bar. In the UDC action (New York State Urban Development Corp. d/b/a Empire State development Corp. v. Ritco International, Inc., Ritco Logistics, Inc., and NY Minute Messenger, Inc., Supreme Court, N.Y. Co.,

Index No. 401388-2009), the UDC alleges, among other things, that Direct Quick Trucking, Inc. ("Direct"), the plaintiff in the action at bar entered into a purchase agreement with NY Minute wherein NY Minute acquired all of Direct's assets, but none of its debts, solely to avoid repaying a UDC grant to Direct, and possibly defrauding the government.

Presently before the court is a motion by Direct for a preliminary injunction, restraining NY Minute from using and continuing to use its lawyer in the UDC action. Direct contends that the parties' purchase agreement clearly provides that NY Minute will "cooperate" with Direct, if any claims are brought against it, and that paragraph 7.3 of the agreement requires the indemnitor (Direct) to defend the indemnitee against any claims made, and assume the cost and expense thereof. Furthermore, NY Minute has been deducting the cost of its legal defense from the monthly payments that it is supposed to make to Direct pursuant to the purchase agreement, and Direct seeks injunctive relief enjoining NY Minute from doing so.

This motion fails and it must be denied for the following reasons:

First, although each side repeats the contents of the purchase agreement, neither side has provided a copy of it to the court so it can independently examine the document because the court is not bound by each party's interpretation of it. Since the burden of proof rests on Direct who is seeking a preliminary injunction, this defect alone is reason to deny Direct's motion.

Looking beyond that defect, Direct is seeking as the temporary relief the ultimate relief in the complaint, which is a decision that NY Minute cannot have its own lawyer and cannot deduct its legal fees from the monthly payments under the purchase

[\* 4]

agreement. Direct is not entitled to receive pendente lite the ultimate relief sought (St. Paul Fire and Marine Ins. Co. v. York Claims Service, Inc., 308 AD2d 347 [1<sup>st</sup> Dept 2007]) and this is another reason to deny the motion for a preliminary injunction.

Reaching the merits, Direct's analogy to its being an insurance carrier is misplaced. In each of the cases Direct cites it is the *indemnitee* who is seeking enforcement of the agreement to be indemnified. Here, it is the indemnitor (Direct) who claims that its interest and those of NY Minute are united and, therefore, NY Minute does not need, and should not be permitted to have, separate counsel of its own choosing. Not only is this statement incorrect, based on the facts before the court, it is a violation of the Constitutional right to be represented by counsel of one's own choosing (U.S. and New York Constitution, Art 1 § 6; Schulman v. Consolidated Edison Co. of New York, Inc., 85 A.D.2d 186 [1<sup>st</sup> Dept 1982]).

In the UDC action Direct is accused of committing various torts and the UDC seeks to hold NY Minute vicariously liable for them. NY Minute has asserted four (4) counterclaims against Direct for contractual and common law indemnification, contribution and breach of warranty. Clearly, Direct and NY Minute are not united in interest, as Direct claims. In any event, the "cooperation" language in the indemnification agreement is not the same as waiving the right to assert counterclaims.

The purpose of a preliminary injunction is to preserve the status quo to the extent possible (*generally*, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d 255 [1<sup>st</sup> Dept 2009]). The party seeking the relief must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (see CPLR § 6301; Nobu Next Door, LLC v. Fine Arts

[\* 5]  
Housing, Inc., 4 NY3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]). Direct has failed to meet any of these requirements. The status quo is that NY Minute has its own lawyer, and Direct has neither shown a likelihood of success on the merits or irreparable harm.

**Conclusion**

For each and reason set forth above, Direct's motion for a preliminary injunction must be denied. A preliminary conference is scheduled in this case for **February 18, 2010 at 9:30 a.m.** in Part 10. No further notices will sent.

Any relief not expressly addressed is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 5, 2010

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JAN 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE