

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
TOUCH OF CLASS TRAVEL, INC.,

Plaintiff,

**Index No. 602151/04
Findings of Fact and
Conclusions of Law**

-against-

RIGHTWAY GATE, INC.,

Defendant.
-----X

WALTER B. TOLUB, J.:

This constitutes this court's findings of fact and conclusions of law after the trial of a contract case on December 5, 2006. The case involves agreements pertaining to the creation, payment and ownership of a website.

When all is said and done, Plaintiff seeks \$24,146.00¹ in damages for: (1) Defendant's failure to provide a website which gave Plaintiff priority access to customers seeking airline tickets; (2) Defendant's use of the cheapairrates.com domain name; and (3) Defendant's failure to turn over the source code for the website created. Defendant seeks damages for breach of contract including unpaid service fees and attorneys fees and sanctions against the Plaintiff and/or Plaintiff's counsel.

¹Plaintiff claims \$28,646.00 in damages but admitted that the services which were the subject of this case, were paid for by Mr. Singaporewalla, who was reimbursed by the Plaintiff's principal, the Plaintiff and Cheap Air Rates, Inc. Payments were made in the amount of \$28,646.00 however a credit card payment in the amount of \$4,500 was made and subsequently reversed by the sponsoring bank. (Tr. 20:10, 65:6, 73:25, 112:16, 122:23-123:13; Defendant's Ex. D).

FINDINGS OF FACT

Breach of Contract

Raj Gupta is the principal of two companies, Touch of Class Travel, Inc. and Cheap Air Rates, Inc. Both companies have done business with Defendant Rightway Gate, Inc. (RWG). RWG is owned by Wolfgang Reile and sells products and services to assist customers in selling their own respective products and services over the internet.

Raj Gupta's internet travel agency, Cheap Air Rates, purchased computer programming services from Defendant. RWG was to create a front end website program to plug into a third party booking program. After some discussion, and before beginning any work, Defendant sent an confirmation of a phone discussion and an estimate to Plaintiff by e-mail dated May 8, 2003. (Defendant's Ex. B).

The e-mail confirmation stated that RWG would program a "travel plug-in" for use with the Sabre reservation system, the E-commerce system would be Searchfit and that the "estimate[d] cost" would be \$12,000. (Id.). The e-mail informed Mr. Gupta that it was necessary for his company to input data into the system in order to make it functional, and that RWG would provide assistance to Mr. Gupta and his company so that they could enter such data into the system. (Id. Tr. 47:7-17, 84:22-85:16). The e-mail confirmation stated that Mr. Gupta's company was to make a

minimum twelve (12) month commitment to the contract and itemized the monthly fees as "Sub User for Mirrors" fees in the amount of \$59.00 per month, "Main User" fees amounting to \$149 per month and "Hosting Fees" at the rate of \$739.00 per month. After not receiving any objections from Mr. Gupta, RWG began the work needed to design a website that was capable of selling airline tickets and achieving high search engine ranking.

Defendant argued and the court agrees that the "Hosting Fee" rates were for the licensed use of RWG's proprietary Searchfit software. (Id.). As described by RWG's expert witness, Anthony Muller, a leading expert on search expert marketing, Searchfit is an e-commerce program that allows a seller to list goods or services online in a manner that is search-engine friendly by creating "static" pages. (Tr. 139:19-24). A search engine determines ranking based on the amount of relevant content on the website. (Tr. 144:13-145:25). By creating static pages that search engines can read, Searchfit increases the content on a website, making it more noticeable to the search-engines and raising its search-engine ranking. (Tr. 142:15-144:2). The marketing program designed by RWG, as described in the confirmation e-mail, included the creation of a travel plug-in for use with the Sabre reservation system which would utilize the Searchfit system. The combination of the Sabre plug in and the Searchfit system was capable of seeking airline tickets for

customers while at the same time intended to achieve high search engine ranking. (Tr. 142:15-144:2).

As stated earlier, the confirmation e-mail stated that RWG would ". . . help you [Mr. Gupta and companies] to setup and entering [sic] products to the system." (Defendant's Ex. B). However, when the time came to enter the data into the system, Mr. Gupta informed Mr. Reile that he wanted to switch from the Sabre airline system to the Patheo system. (Tr. 46:22-47:4, 86:2-5). Herein lies the problem: a significant difference between the Patheo system and the Sabre system from a technical standpoint was that Patheo maintained all the flight data on its system, while Sabre allowed each website operator to store the reservation data on its website. (Tr. 86:6-87:5). If the airline reservation data is stored externally rather than on the individual website itself, it is considered a third party system. Third party systems are unable to obtain a high search engine ranking for the website because the actual website itself does not contain any information on it, the third-party site does. (Tr. 149:20-150:3). When Mr. Gupta informed Mr. Reile that he wanted to switch from Sabre to Patheo, Mr. Reile informed him that neither Searchfit nor the plug-in would work with the customized system created and that by using the Patheo system Mr. Gupta would not achieve a high search-engine ranking. (Tr. 47:10, 49:13, 86:20-87:13).

Mr. Gupta sent Mr. Reile an email dated August 30, 2003, recapping the conversation that the two had on the phone regarding the Sabre Patheo issue. (Defendant's Ex. C). Mr. Gupta wanted to discuss how to salvage the situation in order not to waste RWG's efforts. Mr. Reile proposed creating 500 additional pages of content for the website to try to increase the search engine visibility but Mr. Gupta was unable to afford such a project and agreed only to the creation of 50 pages. (Defendant's Ex. C, Tr. 88:7-89:10). The pages were created but the website did not achieve a high search engine ranking.

Domain Name

As for the domain name at issue, the court concludes that based on the evidence, RWG purchased cheapairrates.com on behalf of Cheap Air Rates Inc. in 2003. Cheap Air Rates, Inc. had full control and ownership of the name. Mr. Gupta did nothing to prevent the registration from lapsing after one year thereby allowing the name to revert back to the public domain. (Plaintiff's Ex. 5, Tr. 91:19-93:14).

Source Codes

With respect to the programming source code for the website that RWG had created for Cheap Air Rates, Mr. Gupta requested nothing more than the source code which was freely accessible to the public. (Tr. 90:6-91:8, 150:19-151:19, 59:15-18). RWG is directed to turn over any source code that is freely accessible

to the public, even if the site is unusable with those codes only. However, any codes which are related to the proprietary Searchfit program and are protected do not have to be turned over to the Plaintiff.

Attorneys Fees and Collection Costs

Mr. Gupta has not paid RWG for the balance of goods and services provided by RWG because he was dissatisfied. Mr. Gupta asked to have charges reversed even though RWG provided those goods and services (domains and hosting fees) to Mr. Gupta's companies. (Tr. 55:24-56:23). Any payments that were made to RWG by credit card requires that the purchaser input his credit card information and then click a button on the computer screen stating that the purchaser agrees to RWG's payment terms. (Tr. 106:12-17). RWG's payment terms provide, in relevant part, that if a customer fails to pay any fees by the applicable due date, the customer "will be responsible for any costs associated with collecting such fees including, without limitation, legal costs, attorneys' fees, court costs and collection agency fees." (Defendant's Ex. E, p. 7). RWG has expended attorneys' fees in trying to recover the amounts due under its counterclaims. (Tr. 106:18-24).

CONCLUSIONS OF LAW

As sympathetic as this court might be to Plaintiff's plight, the parties entered into a binding agreement. The terms of that

agreement, which are set forth in the conformation e-mail, provide for RWG to build a website capable of selling airline tickets using the Sabre reservation system. Merchants may enter into oral sales agreements which are later conformed in a writing by one party. (Bazak International Corp. v. Mast Industries, Inc., 73 NY2d 113, 121 [1989]).

To prove the existence of an agreement in the absence of a fully executed document, the court should consider: (1) whether there had been an express reservation of the right not to be bound in the absence of a writing; (2) whether there had been partial performance of the contract; (3) whether all of the terms of the alleged contract had been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed into writing." (Elizabeth Street Inc. v. 217 Elizabeth Street Corp., 276 AD2d 295, 296 [1st Dept 2000]; quoting Winston v. Mediafare Entertainment Corp., 77 F.2d 78,80 [2d Cir. 1985]). The factors are met here because: (1) Mr. Gupta acknowledged receiving the confirmation e-mail of the project and testified that at the time he had no questions or objections (Tr. 42:11-16); RWG provided the goods and services described in the confirmation e-mail and Mr. Gupta's company made partial payments for those services. (Defendant's Ex. B, Tr. 36:24-39:5); (3) the confirmation e-mail states the parties duties and obligations (Defendant's Ex. B); and (4) this agreement is not the type that

would normally be reduced to writing and the parties previously did business without a written agreement. (Tr. 20:12-17).

The evidence presented at trial indicates that RWG performed the work necessary to program the website using the agreed upon Sabre reservation system and the E-commerce Searchfit program. Furthermore, the testimony of Mr. Muller shows that had Mr. Gupta utilized the software programs recommended, the Cheap Air Rates website would have been capable of not only selling airline tickets but also in attaining a high search engine ranking. (Tr. 83:11-85:16, 142:15-144:2).

The evidence presented, including Mr. Muller's testimony, shows that Mr. Gupta's failure to input the necessary data into the system and his decision to switch from the Sabre reservation system to the Patheo system prevented Cheap Air Rates' website from achieving top search engine ranking. Part of the reason being that the Patheo system was not compatible with the travel plug-in or the Searchfit system. (Defendant's Ex. C, Tr. 85:17-25, 86:20-87:13).

Mr. Gupta requested that the credit card company reverse charges for goods and services provided to Cheap Air Rates and Touch of Class Travel even though those goods and services were provided. (Tr. 55:24-56:23). RWG has not been paid \$9,772.00 for goods and services provided to Mr. Gupta's companies and RWG is therefore entitled to recover that amount. (Defendant's Ex.

3).

Finally, the evidence shows that Mr. Gupta paid for many goods and services by credit card, and that he could not have completed the credit card transaction without accepting RWG's payment terms. (Tr. 106:12-17). RWG's payment terms provide that a customer who fails to pay for goods and services provided shall be responsible for RWG's reasonable collection fees, including attorneys' fees. (Defendant's Ex. E, p. 7).

Accordingly, the court finds that:


Plaintiff's claims are dismissed as Mr. Gupta failed to prove breach of contract where the evidence shows that RWG provided a search engine friendly website.

Furthermore, on the counterclaims, Defendant RWG is awarded \$9,772.00 for amounts due and owing on goods and services provided to Mr. Gupta.

Counsel for the parties are directed to appear for a hearing will be held at 9:30 a.m. at 60 Centre Street, Room 335 on April 30, 2007 to determine any outstanding fees owed on the balance of the contract and attorneys' fees.

This constitutes the court's findings of fact and conclusions of law.

Dated: 4/23/07



HON. WALTER B. TOLUB, J.S.C.