

**Uddoh v Empire City Subway Co., Ltd.**

2016 NY Slip Op 32910(U)

June 6, 2016

Supreme Court, New York County

Docket Number: 109989/11

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York  
County of New York

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Humphrey Uddoh,

Plaintiff,

-against-

Empire City Subway Co., Ltd.,  
Verizon New York, Inc., and  
City of New York,

Defendants.  
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**DECISION AND ORDER**

Index No. 109989/11

**FILED**

JUN 09 2016

COUNTY CLERK'S OFFICE  
NEW YORK

Hon. James E. d'Auguste

The motion by Peña & Kahn, LLC ("P&K"), counsel for plaintiff Humphrey Uddoh ("Uddoh"), seeking permission to be relieved as counsel in this matter is granted (Mot. Seq. 003) and Uddoh's cross-motion seeking disgorgement of funds is denied (Mot. Seq. 004).<sup>1</sup> Those branches of both applications seeking a stay of proceedings to permit Uddoh to obtain new counsel are granted. The Court also declines to sign the orders to show cause submitted by Uddoh seeking a stay of the instant proceedings pending the resolution of a related malpractice action.<sup>2</sup>

P&K's Motion To Be Relieved As Counsel

P&K amply demonstrated an entitlement to withdraw as counsel. Uddoh, who is himself an attorney, has unequivocally stated that he does not want P&K to continue representing him in this matter. Tr. 17:16-20 (Nov. 17, 2015). His stated desire to have a new attorney apparently stems, in

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<sup>1</sup> Justice George Silver, who was originally assigned to handle this matter, has issued an order of recusal. Tr. 2:9-12 (Jan. 12, 2016). Uddoh submitted transcripts of proceedings before Justice Silver to the Court in a letter dated January 15, 2016. See Interim Order (d'Auguste, J.), dated January 29, 2016. Thereafter, oral argument was conducted before the undersigned on two separate dates: March 3, 2016 and May 9, 2016.

<sup>2</sup> Uddoh submitted two orders to show cause seeking a stay of the instant proceedings until such time as a newly commenced malpractice action was decided. This separate malpractice action, *Uddoh v. Peña & Kahn*, Index No. 151776/16 (Sup. Ct., N.Y. County), was transferred to Westchester County, pursuant to CPLR Article 5, in a separate decision and order issued by this Court (d'Auguste, J.), dated May 23, 2016.

part, from his attorneys' failure to proceed with the trial of this action on July 6, 2015. As noted, however, by a P&K attorney that appeared that day: "Mr. Redmond was engaged in another case, he would have tried it at the next available trial date." *Id.* at 28:16–20. Despite the foregoing trial engagement, Uddoh wrote directly to Justice Silver accusing his lawyers of professional misconduct and requesting that sanctions be imposed. *Axisa Aff.*, Exh. 4 (Sept. 9, 2015 letter from Uddoh to Justice Silver). Uddoh followed up on this initial correspondence wherein he continued his attack on P&K and stated that, "[s]hockingly, my attorney, Neil Redmond, inexcusably chose to attend another trial in a separate action, on that date." *Axisa Aff.*, Exh. 5 (Sept. 24, 2015 letter from Uddoh to Justice Silver).<sup>3</sup> According to Uddoh, these letters were submitted after P&K demanded Uddoh advance trial costs in a multi-tiered effort to coerce him into abandoning his claim against the City of New York (the "City"). *Tr.* 39:3–41:6 (May 9, 2016). The Court finds that, irrespective of the basis for sending the letters, Uddoh's repeated accusations of professional misconduct have essentially rendered it impractical, if not impossible, for P&K to continue representing him in this matter.

To the extent necessary to resolve these motions, Uddoh has failed to establish in his court submissions any professional misconduct by P&K. While counsel should have made a better attempt to communicate with the Court and Uddoh, its own client, regarding the actual engagement of trial counsel in another matter on July 6, 2015, Uddoh suffered no discernable prejudice as a result of the proceedings that occurred on that day. While there are some discrepancies regarding the participants' recollections, it is undisputed that a P&K attorney appeared at some point and that a letter involving the engagement of trial counsel was faxed to the Court. The case was eventually adjourned without being struck from the

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<sup>3</sup> Uddoh repeatedly states in his letters (*Axisa Aff.*, Exhs. 4 and 5) that Justice Silver directed P&K to either try the case or disgorge the fees it has already earned. However, Justice Silver clearly states on the record in later proceedings that he never issued such a directive. *Tr.* 34:19–25 (Nov. 17, 2015); *Tr.* 3:5–7 (Oct. 6, 2015). In any event, such a *sua sponte* directive would have been beyond the authority of the trial assignment judge.

trial calendar or otherwise defaulted. Tr. 8:8–25 (Nov. 17, 2015).

Moreover, Uddoh's allegation that P&K misled the Court and counsel for the City is, on close examination, deeply suspect. At an appearance on December 15, 2015, Uddoh stated to Justice Silver that at the July 6, 2015 court appearance a City attorney "told [him] she was under the belief that the case against Verizon had been settled for \$90,000." Tr. 23:25–24:2 (Dec. 15, 2015). If true, Uddoh could not have been surprised by this purported misunderstanding given his statement in a June 25, 2015 text message that "the city thinks we [were] only paid 90k," which was responded to by P&K as stating that "[i]t doesn't matter what they think if we were to go to trial — we would have to tell them what was paid." Uddoh Aff., Exh. H, at 7–9 (Text Messages).<sup>4</sup> Thus, Justice Silver stated during oral argument: "Sir, I wouldn't go down that road because at the end of the day there's a text from you telling them not to correct it as well." Tr. 24:6–9 (Dec. 15, 2015). Under the circumstances, where a P&K attorney informed Uddoh that the City was required to be informed of the actual settlement amount, the Court finds little merit to Uddoh's contention that P&K was attempting to engage in an act of deceit. In any event, the fact that Uddoh publicly accuses his lawyers of engaging in professional misconduct is a basis for permitting them to withdraw as counsel in this action. The foregoing does not mean professional malpractice did not occur given, for instance, the piecemeal resolution of this litigation, but such contentions will be decided in Uddoh's malpractice litigation against P&K and its individual attorneys.

As the Court finds that P&K has amply demonstrated an entitlement to withdraw as counsel, its application is granted. *See Klein v. Eubank*, 87 N.Y.2d 459 (1996). The Court also finds that P&K has demonstrated an entitlement to a charging lien, pursuant to Judiciary Law section 475, as against Uddoh's recovery, if any, from the City. The amount of the charging lien, if any, will be determined at

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<sup>4</sup> Because Uddoh's motion for disgorgement of fees is premised upon purported misconduct by P&K, he arguably waived any privilege attaching to communications and documents submitted to the Court in relation to the instant motions. Nonetheless, the Court will only deem those statements specifically referenced herein as part of the public record.

the conclusion of this matter by a special referee, who will hear and report on the amount of P&K's charging lien with recommendations.<sup>5</sup>

Uddoh's Cross-Motion for Disgorgement of Attorneys' Fees<sup>6</sup>

Uddoh has not demonstrated an entitlement to the disgorgement of attorneys' fees earned by P&K when it assisted Uddoh in settling his claims against defendant Verizon New York, Inc. ("Verizon") in the amount of \$487,500.00. Uddoh requests that P&K's attorneys' fees be disgorged so he can retain a new lawyer at an hourly rate and pay for the costs associated with the trial, such as expert witness fees. While this Court understands Uddoh's professed difficulty in securing a new attorney at this juncture to handle a trial against the City in this action on a contingency basis, this obstacle is not a legal basis for requiring Uddoh's former attorneys to pay either his future legal fees or trial costs in the continued litigation of this matter.

On the issue of P&K disgorging earned fees to fund the costs associated with trial, the Court finds that there is no contractual basis for requiring Uddoh's now former counsel, P&K, to pay the costs associated with a trial against the City. Despite Uddoh claiming such a contractual entitlement, a plain reading of the retainer agreement indicates that P&K was never required to advance trial costs. Instead, it had the discretion to advance the funds, including costs associated with retaining experts, with the

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<sup>5</sup> At present, P&K would be entitled to the "fair and reasonable value of their services, computed on the basis of quantum meruit." *Nabi v. Sells*, 70 A.D.3d 252, 253 (1st Dep't 2009). If, however, Uddoh secures new counsel, the determination of the type of fee P&K would be entitled to pursuant to its charging lien would depend on any agreement between P&K and incoming counsel, and P&K's election to seek compensation "based on quantum meruit for the reasonable value of the services rendered, or a contingent percentage fee to be determined at the conclusion of the litigation." *Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Assocs.*, 41 A.D.3d 367, 370 (1st Dep't 2007).

<sup>6</sup> The Court notes that Uddoh's motion may be denied solely because his affirmation is not in admissible form. Even though Uddoh is an attorney, he is a party to this action. Therefore, his submissions must be in the form of an affidavit. CPLR 2106; *see Harris v. Krauss*, 87 A.D.3d 469 (1st Dep't 2011); *Law Offices of Neal D. Frishberg v. Toman*, 105 A.D.3d 712 (2d Dep't 2013). His affirmation without being in proper form is a legal nullity.

ability to recover any such funds expended from settlement funds or a verdict: "Such costs may be advanced by P&K at P&K's discretion. Clients agree to advance the costs of litigation." Uddoh Aff., Exh. A, ¶ 4 (Retainer Agreement). Thus, P&K was well within its contractual right to demand the advance payment of the costs associated with trial. See Uddoh Aff., Exh. M (Aug. 11, 2015 letter from P&K to Uddoh requesting \$3,000.00 for trial costs pursuant to its retainer). As the parties' retainer agreement did not require P&K to fund the costs of trial when it was serving as attorney of record, there is certainly no legal basis for requiring the firm to fund Uddoh's trial costs after it is no longer his counsel. *Nabi*, 70 A.D.3d at 255 (stating that after the termination of the attorney-client relationship, the retainer agreement no longer governs).

On the issue of P&K paying for a new attorney to handle further proceedings in this matter, the Court finds that there is no contractual requirement that P&K disgorge earned attorneys' fees for a new lawyer to handle the trial of this matter against the City on an hourly basis. Uddoh has not submitted any relevant case law that would support his novel request. Indeed, the decision rendered by the Appellate Division, First Department in *Poulos v. James Lenox House Inc.*, 11 A.D.3d 332 (1st Dep't 2004), to the extent relevant, merely stands for the proposition that at the conclusion of the litigation a determination will need to be made about how much additional attorneys' fees P&K is owed for the time spent litigating this matter as against the remaining defendant in this action. The *Poulos* case does not stand for the proposition upon which Uddoh relies in his motion papers. Thus, the cross-motion seeking disgorgement of attorneys' fees already earned is denied.

Accordingly, it is hereby:

ORDERED that P&K is permitted to withdraw as Uddoh's counsel; and it is further,

ORDERED that P&K is entitled, pursuant to Judiciary Law section 475, to a charging lien against the proceeds of any recovery against the City; and it is further,

ORDERED that, upon demand of plaintiff's legal file, that Uddoh or his incoming counsel reimburse P&K for its disbursements in the amount of \$1,625.31; and it is further,

ORDERED that those parts of P&K's motion and of Uddoh's cross-motion seeking a stay of the action for Uddoh to obtain new counsel is hereby granted; and it is further,

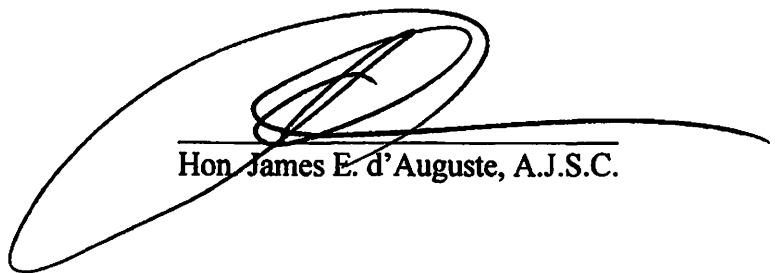
ORDERED that the instant action is stayed up to ninety (90) days from the date of service of a copy of this decision and order with notice of entry; and it is further,

ORDERED that P&K is not required to disgorge attorneys' fees as a result of Uddoh's cross-motion; and it is further,

ORDERED that the note of issue is not vacated and the action shall remain on the trial calendar, but that Uddoh's new counsel or Uddoh himself, if he proceeds in a self-represented capacity, may make a new application when the stay of this action expires; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: June 6, 2016

  
Hon. James E. d'Auguste, A.J.S.C.

**FILED**  
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NEW YORK