

**Platinum Rapid Funding Group, Ltd. v H D W of  
Raleigh, Inc.**

2017 NY Slip Op 32687(U)

December 20, 2017

Supreme Court, Nassau County

Docket Number: 605890-17

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.

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**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**PLATINUM RAPID FUNDING GROUP, LTD.,**

**Plaintiff,**

**- against -**

**H D W OF RALEIGH, INC., d/b/a PURE MED  
SPA, a/k/a PURE COSMETIC AND SURGICAL  
CENTER and HOLLY DONIELLE WYBEL,  
a/k/a HOLLY D. WYBEL,**

**Defendants.**

**TRIAL/IAS PART 18**

**Index No.: 605890-17**

**Motion Date: 10/18/17; 11/20/17**

**Sequence No.: 001**

*MG*

**DECISION AND ORDER**

The following papers have been read on this motion:

Sequence No. 001:

Order to Show Cause, Affirmation and Exhibits.....	1
Affirmation in Opposition and Exhibits.....	2
Reply Affirmation and Exhibits.....	3
Supplemental Affirmation in Opposition and Attachments.....	4

**PRELIMINARY STATEMENT**

In Sequence No. 001, plaintiff makes this application for an Order: (1) pursuant to New York State Judiciary Law § 470, disqualifying Rayminh L. Ngo and Higbee & Associates, from appearing before this Court and representing the defendants for failure to maintain an office for the transaction of law business in the State of New York; (2) striking defendants' answer, including any exhibits, and Rayminh L. Ngo's notice of appearance upon the grounds that Rayminh L. Ngo and Higbee &

Associates do not meet the requirements for practicing law in the State of New York; (3) upon disqualifying Rayminh L. Ngo and Higbee & Associates from appearing before this Court, staying this action for thirty (30) days so that defendants can procure new counsel; (4) sanctioning defendants' counsel in an amount to be decided by the Court plus costs in the amount of \$140.00, plaintiff's actual cost of filing a request for judicial intervention and the instant Order to Show Cause; and (5) granting plaintiff such other, future and different relief as may be just, proper and/or equitable. Defendants have submitted opposition to this application and plaintiff has submitted a Reply.

#### BACKGROUND

Plaintiff, Platinum Rapid Funding Group, Ltd. ("Platinum"), and the defendant, HDW of Raleigh, Inc. d/b/a Pure Med Spa a/k/a Pure Cosmetic and Surgical Center (herein referred to as "HDW" or the "Business Defendant") entered into a Sales Agreement, dated January 4, 2017, wherein the Business Defendant sold \$324,000.00 of its business revenue to the plaintiff, to be paid to the plaintiff from a percentage of the Business Defendant's daily revenue, for an up-front sum of \$225,000.00 from the plaintiff. The defendant Holly Donielle Wybel a/k/a Holly D. Wybel ("Wybel") is the owner and operator of the Business Defendant and personally guaranteed the obligations of the Business Defendant in the agreement.

Plaintiff commenced this action against the defendants on or about June 20, 2017 asserting claims for breach of contract, breach of representations and warranties, breach of the personal guarantee of performance, conversion of receivables and a request for attorneys' fees based upon the terms of the agreement between the plaintiff and the defendants. The defendants served a Verified Answer with Counterclaims wherein they purport to assert three counterclaims for fraud, unjust

enrichment, and declaratory judgment – each of which is predicated upon their claim that the agreement is civilly and criminally usurious – as well as twenty-one affirmative defenses.

#### DISCUSSION

Upon the instant applications, the plaintiff seeks: (1) to disqualify the defendants' counsel – namely Rayminh L. Ngo and Higbee & Associates – from appearing before this Court and representing the defendants for failure to maintain an office for the transaction of law business in the State of New York; and (2) to dismiss the defendants' counterclaims and affirmative defenses.

The rules on disqualification of counsel are easily stated. The decision to disqualify an attorney from representation rests with the discretion of this court (*Cardinale v. Golinello*, 43 NY2d 288, 296 [1977]; *Lauder v. Goldhamer*, 122 AD3d 908 [2<sup>nd</sup> Dept. 2014]). Initially, however, it is the party seeking to disqualify a law firm or an attorney that bears the burden of demonstrating the need for disqualification” (*Gulino v. Gulino*, 35 AD3d 812 [2<sup>nd</sup> Dept. 2006]; *Goldman v. Goldman*, 66 AD3d 641 [2<sup>nd</sup> Dept. 2009]).

Pursuant to Judiciary Law §470 entitled “Attorneys having offices in this state may reside in adjoining state”:

A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.

That is, this statutory directive that nonresident attorneys maintain an office within the State “for the transaction of law business” requires nonresident attorneys to maintain a *physical* office in New York (*Schoenefeld v. State of New York*, 25 NY3d 22 [2015]). Indeed, an attorney or firm that has appeared in an action while violating Judiciary Law §470 must be disqualified from continuing to appear or represent any of the parties in the action (*see generally, In re Estate of Garrasi*, 29

Misc.3d 822 [Surr. Ct. Schenectady 2010]).

Based upon the papers submitted herewith, this Court finds that, in this case, neither Higbee & Associates (“Higbee”) nor Rayminh L. Ngo (“Ngo”) had a physical office in the State of New York at the time that they appeared in this action on behalf of the defendants (*Id.*). Thus, said entities are all non-residents and have failed to comply with the Judiciary Law §470. Indeed, the papers herein establish that Ngo and Higbee’s pleading – the Verified Answer and Counterclaims – identified their principal office to be located in Santa Ana, California (Motion, Ex. 2). In addition, Ngo’s attorney registration states that he is not an associate or partner of Higbee and is actually the principal of the Ngo Law Practice – a law firm based in Salt Lake City, Utah ( Motion, Ex. 5).

In his affirmation in opposition, Ngo avers that he is “an attorney duly admitted to practice law before the courts of the State of New York and [is] currently the attorney of record for the Defendants” (Aff. In Opp., ¶1). He adds that he is representing the defendants in his capacity as “of-counsel” to Higbee, “a multijurisdictional law firm based in California with whom I have long been associated” (Aff. In Opp., ¶5) and which “maintains office spaces in various states, including in New York” where it currently maintains two offices (Aff. In Opp., ¶6). Specifically, it is counsel’s contention that Higbee currently has lease agreements for two office spaces and addresses in New York at: 48 Wall Street, Suite 1100, New York, NY 10005 and 605 West Genesee Street, Suite 101, Syracuse, New York 13204.

Despite their contentions however, this Court finds no merit to the defendants’ counsel’s claims that they should not be disqualified. Initially, this Court cannot overlook the fact that at no point does Ngo aver that either he or Higbee have attorneys or law firm staff at either of the two New York addresses that they claim to be located at.

Moreover, while Ngo furnishes the lease agreements in his Supplemental Affirmation in Opposition, said documents also fail to establish that at the time that this lawsuit was commenced – i.e., on or about June 20, 2017 – and at the time they appeared in this action on behalf of the defendants, the defendants' counsel had offices in New York State. Specifically, the lease agreement document furnished by the defendants for the 48 Wall Street address clearly states that said lease agreement commenced on July 13, 2012 and expired on October 31, 2012. Similarly, the office sub-lease agreement furnished by counsel for the 605 W. Genesee Street location clearly states that said lease agreement commenced on October 3, 2017. (The W. Genesee Street lease agreement was signed on October 3, 2017.) Thus, there has been no showing or any evidence that at the time this suit was commenced, the defendants' attorneys had offices in the State of New York (cf. Judiciary Law §470).

In the end, this Court finds that there is no evidence on this record that Ngo and Higbee had physical addresses in New York. Moreover, this Court cannot overlook the fact that the defendants have failed to offer any competing evidence against the sworn affidavits of Steven Pena and Jakeen Penns, Sr., process servers who attest that they physically went to the 48 Wall Street and or 605 West Genesee addresses, respectively, and confirmed that neither Ngo nor Higbee had physical offices at these locations. Accordingly, this Court herewith awards the plaintiff its instant motion to disqualify the defendants' attorneys of record – Raymin L. Ngo and Higbee & Associates.

Having disqualified defendants' counsel of record – namely Ngo and Higbee – this Court also grants that part of plaintiff's application which seeks to stay this action for thirty (30) days from the date of entry of this Decision and Order so as to permit the defendants time to procure new counsel.

In light of the foregoing stay, this Court adjourns the plaintiff's second application – Mot.

Seq. 002 – to February 20, 2018 (the same day that Motion Sequences 003 and 004 are due before this Court). Specifically, the defendants are afforded until February 2, 2018 to submit any opposition that they may so wish to Motion Sequence 002. The plaintiff shall have until February 20, 2018 to submit any reply papers to said opposition.

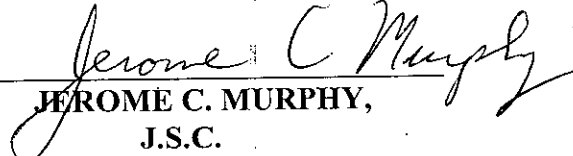
The parties remaining contentions have been considered and do not warrant discussion.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
December 20, 2017

**ENTER:**

  
**JEROME C. MURPHY,**  
J.S.C.

**ENTERED**

DEC 29 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE