

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**ELIOT I. BERNSTEIN et al.,**

**Plaintiffs,**

**- against -**

**APPELLATE DIVISION FIRST  
DEPARTMENT DISCIPLINARY  
COMMITTEE et al.,**

**Defendants.**  
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**ORDER**

**07 Civ. 11196 (SAS)**

**SHIRA A. SCHEINDLIN, U.S.D.J.:**

**I. INTRODUCTION**

Plaintiffs Eliot I. Bernstein and P. Stephen Lamont have filed *ex parte* motions to proceed *in forma pauperis*, for appointment of pro bono counsel, extension of time to file their amended complaint, an order for the United States Marshals to serve defendants, physical protection of plaintiffs for court appearances, acceptance of the remote appearance of Bernstein for court appearances, and for this Court to accept the limited powers of attorney signed by plaintiffs. These motions are addressed in turn.

**II. MOTIONS**

**A. Appointment of Counsel**

## 1. Legal Standard

In *Hodge v. Police Officers*, the Second Circuit set forth the factors a court should consider in deciding whether to grant an indigent pro se litigant's request for appointment of counsel.<sup>1</sup> As a threshold requirement, the court must decide whether the litigant's claim "seems likely to be of substance."<sup>2</sup> If the litigant satisfies this requirement, the court must next consider such factors as:

the indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.<sup>3</sup>

In considering these factors, district courts should neither apply bright-line rules nor automatically deny appointment of counsel until the applicant has survived a dispositive motion.<sup>4</sup> Indeed, none of these factors should be considered controlling in a particular case.<sup>5</sup> Each case must be decided on its own facts.

## 2. Background

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<sup>1</sup> 802 F.2d 58, 61-62 (2d Cir. 1986).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 61-62.

<sup>4</sup> *See Hendricks v. Coughlin*, 114 F.3d 390, 392-93 (2d Cir. 1997).

<sup>5</sup> *Hodge*, 802 F.2d at 61.

Plaintiffs claim that they are the victims of what they describe as “a conspiratorial pattern of fraud, deceit, and misrepresentation, that runs so wide and so deep, that it tears at the very fabric and becomes the litmus test of what has come to be known as due process and free commerce in this country . . . .”<sup>6</sup> The story begins when plaintiffs brought potential patents to the law firm Proskauer Rose LLP, presumably for registration services. Allegedly, attorneys for the firm realized the value of these patents, which plaintiffs claim have tremendous significance for “all forms of video delivery, digital cameras, digital imaging technologies for medical purposes and digital video,”<sup>7</sup> and decided to use the technology described in the patents for their own benefit.

Plaintiffs filed complaints against the attorneys responsible, but defendant Thomas J. Cahill, Chief Counsel of the First Department Disciplinary Committee, “masterminded a scheme to aid and abet in indefinitely delaying the complaints against these attorneys,”<sup>8</sup> At some point during the dispute, plaintiffs allege that certain of the attorneys from Proskauer Rose LLP and defendant the Honorable Judith S. Kaye, Chief Judge of the New York Court of Appeals,

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<sup>6</sup> Complaint (“*Compl.*”) ¶ 4.

<sup>7</sup> *Id.* ¶ 76.

<sup>8</sup> *Id.* ¶ 78.

attempted to murder Bernstein's family.<sup>9</sup>

### 3. Discussion

"Extraordinary claims require extraordinary evidence."<sup>10</sup> Plaintiffs have alleged that a highly respected law firm, various prominent attorneys, and a preeminent jurist have conspired to profit illicitly from plaintiffs' inventions and to murder Bernstein's family. At this stage in the proceeding, based solely on the allegations, this Court cannot say that plaintiffs' claim "seems likely to be of substance."

The other *Hodge* factors are mixed. There is no indication that plaintiffs lack the ability to investigate the facts of the case. Plaintiffs seem reasonably able to present their case. However, their conspiracy charge raises complex issues of law.

On balance, I do not think it is appropriate to appoint counsel at this time. However, as the case develops, if plaintiffs are able to demonstrate that their claims are likely to be of substance, this Court may reconsider its decision. For the foregoing reasons, petitioner's application for appointment of counsel is

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<sup>9</sup> See *id.* ¶ 79.

<sup>10</sup> This expression was frequently stated by Carl Sagan, likely paraphrasing an argument from David Hume, *An Enquiry Concerning Human Understanding* (1748).

denied.

**B. Extension of Time to File Amended Complaint**

Plaintiffs request an additional sixty days after service to file an amended complaint due to the complexity of their case and the number of parties. This request is denied. Plaintiffs must file any amended complaint within twenty days after service of the complaint upon all defendants.

**C. *In Forma Pauperis* and Service by the U.S. Marshals**

After reviewing the declarations in support of plaintiffs' request to proceed *in forma pauperis*, the Court finds that plaintiffs are capable of affording the requisite filing fees and other attendant costs of litigation and so denies their request. Rule 4 of the Federal Rules of Civil Procedure permits the Court to appoint an official to serve the Complaint on behalf of plaintiffs. In light of the nature of plaintiffs' claims, the Court hereby orders the United States Marshals to serve the Complaint on behalf of defendants.

**D. Physical Protection of Plaintiffs and Remote Appearances by Bernstein**

Plaintiffs claim that they are in physical danger and ask this Court to provide physical security during all proceedings related to their suit. Bernstein requests that he be granted permission to make all appearances telephonically until

security measures are in place.

This Court has full confidence in the ability of the United States Marshals and the Office of Court Security to protect plaintiffs during all proceedings. In the absence of any indication that their current operations are insufficient, additional security measures are not necessary at this time. Because current security is sufficient to ensure plaintiffs' safety, I deny Bernstein's request to appear telephonically.

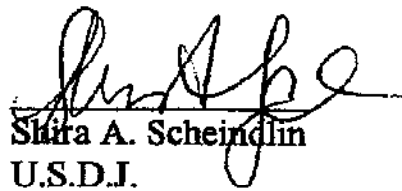
**E. Acceptance of Plaintiffs' Limited Powers of Attorney**

Plaintiffs seem to request that they be granted the power to sign court documents on behalf of one another. Rule 11 of the Federal Rules of Civil Procedure provides that every pleading must be signed by the party. The rules do not provide an exception for plaintiffs who are not located in the district in which their action is filed. Consequently, plaintiffs' request is denied.

**III. CONCLUSION**

For the reasons stated above, plaintiffs' motions are granted in part and denied in part. The United States Marshals are directed to serve the Complaint on defendants. Plaintiffs will have until twenty days after service is completed on all defendants to file an amended complaint. The Clerk of the Court is directed to close these motions (document no. 2 on the docket sheet).

SO ORDERED:

  
Shira A. Scheindlin  
U.S.D.J.

Dated: New York, New York  
January 9, 2008

**- Appearances -****Plaintiffs (pro se):**

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