

# MASSACHUSETTS Lawyers Weekly

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## Finding ‘serious misconduct,’ judge orders mistrial

■ PAT MURPHY

A Superior Court judge ordered a rare mistrial in a civil case after defense counsel twice raised criminal matters concerning the corporate plaintiff’s owner during the questioning of witnesses.

Judge Adam Hornstine declared the mistrial in *Tufts Construction Inc. v. City of Malden* on Aug. 6. Tufts Construction is seeking damages in excess of \$10 million on claims stemming from the city’s alleged failure to pay for work performed by the plaintiff.

The judge granted the plaintiff’s motion for a mistrial after defense attorney Zaheer Samee asked co-defendant Yem Lip, the city’s engineer, whether he knew Tufts Construction owner Peter Tufts had been placed in handcuffs in an incident involving police.

Earlier at trial, the plaintiff had unsuccessful-

ly moved for a mistrial when, during cross-examination, Samee asked a former employee of the city if the witness was aware that a federal grand jury had subpoenaed the city for invoices submitted by the plaintiff.

“Mistrial allowed because serious misconduct occurred during the proceedings that was likely to affect the justice of the verdict and because justice may not be done if trial continued,” the judge wrote in granting the plaintiff’s renewed motion.

The plaintiff is represented by Boston attorneys Stephen J. Kuzma and India L. Minchoff.

Kuzma said he and his co-counsel carefully weighed the decision to move for a mistrial.

“Basically, we had to sleep on it after the offense [by defense counsel] and decided we had to do it,” Kuzma said.



India L. Minchoff

*“You just can’t ‘un-ring’ the bell. And in this case, the bell kept on ringing.”*

— INDIA L. MINCHOFF, BOSTON

“There was no way to scrub the record of what had occurred,” Minchoff added. “It was a cumulative effect of more than one incident from opposing counsel. As the judge put it, there wasn’t a curative instruction that we were confident enough could have repaired the damage. You just can’t un-ring the bell. And in this case, the bell kept on ringing.”

Samee, a Burlington attorney, declined a request for an interview, as did defense attorney Mark E. Rumley of Medford.

In their opposition to the plaintiff’s renewed motion for a mistrial, the

defense argued that Samee’s question to co-defendant Lip related to a verbal altercation between Peter Tufts and a Malden police officer.

According to the defense, the question was permissible because it was posed not for the truth of the matter asserted. Rather, the defense argued, the question simply sought to establish Lip’s state of mind when providing a reference to a certain consulting firm that was considering doing business with Tufts Construction.

Moreover, the defense argued that a mistrial was

unnecessary because the court's curative instruction to the jury that counsel's questions were not evidence "was sufficient to cure the risk of undue prejudice to Plaintiff."



Christopher A. Duggan

Lincoln trial attorney Christopher A. Duggan secured a defense victory in the 2021 landmark Supreme Judicial Court decision in *Fitzpatrick v. Wendy's Old Fashioned Hamburgers of New York*. The decision held that trial judges must rule on motions for mistrial "when made," and that the standard for granting a new trial governs whether to retry a case until after the jury returns its verdict.

Duggan said that, in his experience, mistrials in civil cases are "extremely" rare.

"One reason is that the standard that you have to meet is really high," he said. "[You need to show]

something happened that is so egregious as to impact the substantial rights of the parties and the likelihood of a just verdict."

Minchoff said mistrials are even rarer in civil cases in which the plaintiff files the motion, such as in Tufts Construction.

"I've been in practice for 40 years and I don't recall seeing a motion for a mistrial in a civil case in 40 years. It just doesn't happen," Kuzma said. "It's much more common to file a motion for a mistrial in a criminal case to preserve a record for appeal when you're dealing with individuals who may have their freedom taken away, when there's prosecutorial misconduct."

But Waltham litigator James E. Harvey Jr. said he has had three mistrials in his career.

"You've got to decide fast," he said. "[The misconduct] might happen in the opening statement. That happened to me once. I represented the plaintiff in the case. [Defense counsel] said, 'We shouldn't even be here. They already settled and got a lot of money from another defendant.' We got a mistrial in that one."

## **CONTRACT DISPUTE**

According to court records, the plaintiff sued the city and Lip in June 2021. The plaintiff's complaint alleges the city owed Tufts Construction for work performed in certain construction projects it was awarded in a bidding process. The complaint alleges more than \$250,000 in unpaid invoices. The plaintiff also claims it lost out on bids for other work because of Lip's false negative reviews of its work.

The plaintiff asserted claims for breach of contract, breach of the duties of good faith and fair dealing, interference with business relationships and prospective contractual relations, and defamation.

"Upon Plaintiff's complaints regarding unpaid invoices with the City of Malden, Yem Lip, Director of Engineering, provided negative references to other municipalities causing Plaintiffs substantial financial harm," the complaint states. "Yem Lip's references were contradicted by the senior engineer for the City of Malden who found the Plaintiff's workmanship to be 'great.'"

In January 2025, the defendants filed a motion in limine to allow the use of evidence that Peter Tufts in 2023 had been convicted in federal court for tax evasion and filing false loan applications. Judge Allison D. Burroughs sentenced Tufts in the criminal case to time served followed by two years of supervised release.

A ruling on the Malden defendants' motion was deferred until trial. On July 28, shortly before the start of trial, the plaintiff filed a motion to exclude evidence of Tufts' convictions.

The next day Hornstine ruled that the court would not admit evidence of Tufts' prior convictions for all purposes but reserved for trial the question of whether such evidence would be admitted for impeachment purposes under Evidence Rule 609.

## **'SERIOUS MISCONDUCT'**

Trial in the civil case commenced on July 29. The plaintiff filed a motion for mistrial on Aug. 1 after Samee asked during his cross-examination of Glenn Calla, a former employee of the city,

whether he knew of a federal grand jury subpoena for Tufts Construction invoices.

“The question posed improperly suggested to the jury that Plaintiff had engaged in improper billing practices as it related to the City of Malden and that such conduct rose to [the] level of, at a minimum, a grand jury criminal investigation,” plaintiff’s counsel wrote in the first of two motions for mistrial.

Plaintiff’s counsel also claimed that while posing his question, Samee held up a document for the jury to see.

The plaintiff moved for a mistrial a second time on Aug. 6 when Samee asked defendant Lip whether he knew that Peter Tufts had been “placed in handcuffs” as a result of an incident involving a police officer. Once again, plaintiff’s counsel pointed out that Samee had a document in his hand when he asked the question.

According to Minchoff, the police report in Samee’s hand reflected exactly the opposite of what defense counsel was attempting to convey.

“Mr. Tufts had never been placed in cuffs by the police officer with respect to this incident,” plaintiff’s counsel wrote in again moving for a mistrial. “Counsel knew that it had not occurred and also knew that the witness therefore had no knowledge of it. Counsel for the defendant, as he has done repeatedly, is attempting to testify through improper questioning of witnesses. There was no good faith basis for the question and it was interposed for the sole purpose of

further prejudicing Plaintiff and tainting the jury.”

The second motion for mistrial succeeded.

Duggan said the result was not surprising given that the issue of whether Tufts’ prior criminal convictions would come into evidence had been raised twice before trial.

“I suspect the court was pretty frustrated when the issue came up,” he said. “Anytime such a sensitive issue is going to be raised on either direct or cross-examination, counsel needs to think long and hard about how to do that and whether it would be a good idea to request a sidebar and give the judge a head’s up.”

## **STRATEGIC CONSIDERATIONS**

A new trial in the case is scheduled to start on Oct. 27. According to the plaintiff’s lawyers, the next move will be to file a motion for attorneys’ fees and costs, although the amounts to be sought as compensation for expenses incurred in the terminated trial have yet to be finalized.

“It was with extreme reluctance that this motion [for mistrial] was even filed,” Minchoff said. “Nobody wants to [take up the time] of 17 witnesses, 14 jurors and the commonwealth. My client has been waiting four years for his day in court, and one day before the evidence was supposed to conclude there’s a mistrial.”

Kuzma said he heard one of the jurors express frustration in a courthouse elevator over the mistrial.

“Just imagine: 14 people had basically two weeks taken out of their summer. They were very disappointed that it ended this way,” he said.

According to Duggan, there are strategic considerations at play when a trial lawyer is confronted with potential grounds for a mistrial. Apart from considering the added costs facing the client when a case needs to be retried, Duggan said litigators take into account whether the client stands a good chance of success if the trial is allowed to continue to a verdict.

“If you think it’s all going swimmingly for you, you don’t want to snatch defeat out of the jaws of victory,” he said.

Harvey agreed.

“Suppose [the misconduct by the other side] occurs late in the case or at closing argument,” he said. “You really need to think hard about that because you may be on the brink of winning the case. Maybe the other side misbehaved just because they wanted a new trial. It depends on how badly you think they’ve hurt your case by the misconduct. In [Tufts Construction,] it was really bad conduct. The judge probably really was mad.”

Duggan said there are also practical considerations weighing on a court when deciding to grant a mistrial in a civil case.

“It takes a lot to take get a case to trial,” he noted. “It’s a big investment of time on the part of the lawyers, parties, court and jurors. All of that is wasted if you have a mistrial.”