

**Kremen v Benedict P. Morelli & Assoc., P.C.**

2007 NY Slip Op 31141(U)

April 27, 2007

Supreme Court, New York County

Docket Number: 0101739/2006

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
Justice

PART 12

Kramen

INDEX NO. 101739/06

MOTION DATE \_\_\_\_\_

- v -

Benedict P. Marelli et al

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*decided for attached*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**FILED**

MAY 09 2007

NEW YORK COUNTY CLERKS OFFICE

Dated: 4/27/07

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----x  
VICTORIA KREMEN and BORIS KREMEN,

Plaintiffs,

-against-

Index No.: 101739/06

BENEDICT P. MORELLI & ASSOCIATES, P.C.,  
a/k/a MORELLI RATNER, P.C., BENEDICT P.  
MORELLI, ESQ., DAVID S. RATNER, ESQ.,  
SCHAPTRO & REICH, ESQS., STEVEN SCHAPIRO,  
ESQ., and PERRY S. REICH, ESQ.,

Defendants.

-----x  
**EMILY GOODMAN, J.S.C.:**

**FILED**  
MAY 09 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

This legal malpractice action involves an analysis of the interaction between federal bankruptcy laws and state law claims of medical malpractice. In this action, Victoria Kremen (Kremen) and her husband Boris Kremen (collectively, Plaintiffs) seek a judgment against Benedict P. Morelli & Associates, P.C. a/k/a Morelli Ratner, P.C., Benedict P. Morelli, Esq. and David S. Ratner, Esq. (collectively, Defendants), as well as others, for negligently prosecuting a medical malpractice action on their behalf.

More specifically, Plaintiffs allege that Defendants failed to raise the fact, in the underlying medical malpractice action, that Kremen was in bankruptcy, which provided an extension of the limitations period for commencing that action. Plaintiffs further allege that had such fact been raised, the court would have found the action timely, and Plaintiffs would have

ultimately obtained a judgment in their favor. Defendants move to dismiss Plaintiffs' complaint for failure to state a cause of action, based solely on the argument that raising the bankruptcy toll would not have saved the underlying medical malpractice action because it was already time barred when Kremen filed for bankruptcy. By Decision and Order, dated October 23, 2006, (interim decision) the Court requested further briefs on the issue of the application of the bankruptcy toll. For the reasons stated herein, Defendants' motion to dismiss is denied.

#### Background

In April 1995, Kremen went to Dr. Susan Kaiser for a medical consultation. Allegedly diagnosed by Dr. Kaiser as having breast cancer, Kremen went to Dr. Steven Brower for a second opinion. On July 10, 1995, Kremen underwent a bilateral mastectomy performed by Dr. Kaiser. Kremen claimed that she first learned that she was mis-diagnosed with breast cancer on April 14, 1999, when she took her records to another surgeon, and that the mastectomy was unnecessary. On October 14, 1999, Kremen filed for bankruptcy relief under chapter 7, title 11 of the United States Code (Bankruptcy Code). Mr. John Pereira was appointed as bankruptcy trustee in Kremen's chapter 7 case.

On June 9, 2001, Plaintiffs retained Defendants, as counsel, to commence a medical malpractice action against Dr. Kaiser and Dr. Brower, and other healthcare providers. Defendants were

informed of Kremen's bankruptcy filing. On July 21, 2001, Defendants commenced the medical malpractice action in the name of the bankruptcy trustee and Plaintiffs, asserting, among other things, a lack of informed consent claim and a fraudulent concealment claim against the medical malpractice defendants.

In December 2001, Defendants wrote to the bankruptcy trustee requesting him to abandon the medical malpractice action to Kremen, so that she could continue to prosecute the action in her name alone. Apparently, the trustee refused. Thereafter, in November 2002, Defendants moved the bankruptcy court, in effect, for an order compelling the trustee to abandon the action to Kremen. The motion was opposed by the trustee. By order dated January 21, 2003, the bankruptcy court granted the motion, and approved of removing the name of the trustee, as plaintiff, from the caption of the medical malpractice action. The order also denied debtor Kremen's request for a discharge in bankruptcy.

In December 2003, several defendants in the medical malpractice action were granted summary judgment, dismissing the action as against them. The dismissal of these defendants is not the subject of the instant action. Thereafter, in March 2004, summary judgment was also granted in favor of the remaining defendants, including Dr. Kaiser and Dr. Brower, on the basis that more than 2 1/2 years, the limitations period for a medical malpractice action under CPLR 214-a, had already expired since

the date of the alleged malpractice. The trial court also rejected Plaintiffs' claim of fraudulent concealment. *Kremen v Brower, M.D. et al.*, Index No. 112829/01 (J. Carey, Sup Ct NY County 2004). Plaintiffs wanted to appeal, but could not reach an agreement with Defendants as to legal fee issues. Hence, Plaintiffs retained new counsel, who are the other defendants named in the caption of this action, for the appeal.

The appeal was unsuccessful. However, the appellate court stated in a decision dated March 8, 2005, that:

The complaint was properly dismissed as against Drs. Brower and Chun for lack of evidence of fraudulent concealment estopping them from asserting the statute of limitations ... Concerning Dr. Kaiser, the surgeon who allegedly diagnosed the cancer and who performed the mastectomy, while plaintiff's deposition testimony that Dr. Kaiser told her that she had breast cancer and then concealed that misdiagnosis after receiving negative pathology reports may be sufficient to raise an issue of fact as to fraudulent concealment, plaintiff failed to commence the action within a reasonable time after the estoppel ceased to be operational ... Plaintiff admits that she became aware of the alleged misdiagnosis on April 14, 1999, when she took her medical records to another reconstructive surgeon. Her subsequent delay in commencing the instant action until July 2001, two years and three months later, was unreasonable as a matter of law (*cf. Harkins v Culleton*, 156 AD2d 19, 23-24 [1990], *lv dismissed* 76 NY2d 936 [1990]).

*See Kremen v Brower, M.D. et al.*, 16 AD3d 156, 157-158 (1<sup>st</sup> Dept 2005). Relying on the First Department's citation to *Harkins v Culleton*, Plaintiffs take the position that the appellate court

would have found the medical malpractice claim against Dr. Kaiser timely, had Defendants herein raised the fact of Kremen's bankruptcy filing within six months of her discovery of the alleged fraudulent concealment, and the applicable bankruptcy tolling provision.

Thus, in their complaint, Plaintiffs assert that Defendants committed legal malpractice, because they failed to state in the pleadings filed in the medical malpractice action, including the opposition papers to the summary judgment motion by the defendants therein, the fact of Kremen's bankruptcy and of the Bankruptcy Code's extension of the limitations period.

Under section 108 of the Bankruptcy Code, if "applicable nonbankruptcy law" fixes a period within which a debtor may commence an action, and such period has not expired when the debtor filed for bankruptcy relief, the bankruptcy trustee may commence such an action within two years after the date of the debtor's bankruptcy filing. 11 USC § 108 (a) (2).

Originally ignoring Plaintiffs' estoppel argument, Defendants contended that by the time Kremen filed for bankruptcy relief, the statute of limitations in the medical malpractice action had already expired under CPLR 214-a (on January 19, 1998). Eventually, in their reply, Defendants acknowledged Plaintiffs' argument, which combines the extension of the tolling period under the Bankruptcy Code, with the extension under the

principles of equitable estoppel and/or fraudulent concealment. Defendants further contended in their reply that the bankruptcy extension cannot be applied in the way Plaintiffs contemplated, because the principles of equitable estoppel and/or fraudulent concealment are not "applicable nonbankruptcy law" within the meaning of the Bankruptcy Code.

Because the parties did not provide any case law in support of their respective arguments, they were directed, pursuant to this Court's interim decision, to submit memorandum of law regarding whether the Bankruptcy Code could be applied in the manner contemplated by Plaintiffs. Instead of addressing this issue in the memorandum of law, Defendants ignored the Court directive and improperly raised a new argument.<sup>1</sup>

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<sup>1</sup>Specifically, Defendants maintain in its brief that the bankruptcy tolling provision is not available to Plaintiffs because the trustee abandoned the medical malpractice claim to Kremen. No reason has been presented why this argument was not previously raised, and Plaintiffs have had no opportunity to address it. Thus, the argument is rejected as untimely. However, the Court notes that the relevant bankruptcy records reflect that Defendants wrote to the trustee in December 2001 requesting that he abandon the medical malpractice claim to Kremen to be prosecuted in her name; that in November 2002 Defendants sought an order of the bankruptcy court, over the trustee's objection, compelling the trustee to abandon such claim to Kremen; and that the bankruptcy court granted the motion in January 2003. Therefore, even assuming Defendants' argument has merit, and Defendants' advice would have caused Kremen to lose the benefit of bankruptcy tolling provision, the action for legal malpractice could still exist, albeit based upon a different theory.

### Applicable Legal Standards

In considering a CPLR 3211 motion to dismiss, the court's task "is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1<sup>st</sup> Dept 2003), quoting *511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are also to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martincz*, 84 NY2d 83, 87-88 (1994). While factual allegations contained in a complaint should be accorded "favorable inference," bare legal conclusions of law and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1<sup>st</sup> Dept 1995).

### Discussion

In this motion, the only issue is whether Defendants have demonstrated, as a matter of law, that even if they had raised the two year extension provided under the Bankruptcy Code (the alleged malpractice in this action), the medical malpractice action would still have been time barred.

Tolling Under Section 108 (a) of the Bankruptcy Code

As noted above, section 108 of the Bankruptcy Code provides in relevant part that: "[i]f applicable nonbankruptcy law ... fixes a period within which the debtor may commence an action, and such period has not expired before the date of the [debtor's] filing of the [bankruptcy] petition, the trustee may commence such action only before ... two years after the order of relief." 11 USC § 108 (a) (2). In turn, section 301 of the Bankruptcy Code provides that "the commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." 11 USC § 301 (b).

In this case, Kremen filed a voluntary case under chapter 7 of the Bankruptcy Code on October 14, 1999. Pursuant to section 108 (a) (2), if the medical malpractice action was commenced by the trustee within two years thereafter (i.e., on or before October 14, 2001; it was actually commenced on July 21, 2001), the action would have been timely if "applicable nonbankruptcy law" provides that the malpractice claim "has not expired" on the date of Kremen's bankruptcy filing.

The phrase "applicable nonbankruptcy law" is not defined in the Bankruptcy Code, but it has been interpreted by the courts to mean applicable federal and state laws, including statutory and decisional laws. *Patterson v Shumate*, 504 US 753 (1992) (the U.S. Supreme Court looked at state spendthrift laws and federal

ERISA statutes to determine the debtor's interest in qualified pension plans for inclusion in the debtor's estate). Hence, with respect to the state law claims at issue here (i.e., fraudulent concealment or equitable estoppel in the context of a medical malpractice action), New York's statutory and decisional laws on tolling of statute of limitations is "applicable nonbankruptcy law" within the meaning of section 108 of the Bankruptcy Code.

The case of *In re Fruehauf Trailer Corp.*, (250 BR 168 [D. Del 2000]), is illustrative, even though it involved Delaware law. In that case, the liquidating creditor trust, on behalf of the debtors' estates, brought actions against the debtors' former corporate parent and certain directors, alleging, among other things, breach of fiduciary duty and mismanagement. Defendants moved to dismiss on the ground that the claims were time barred under Delaware's statute of limitations. *Id.* at 184. Combining the tolling under section 108 (a) of the Bankruptcy Code with the equitable tolling due to defendants' fraudulent concealment, the court denied defendants' motion to dismiss, holding that "the complaint adequately alleges affirmative acts of fraudulent concealment, sufficient to toll the statute [of limitations.]" *Id.* at 185-189. See also *Mi-Lor Corp. v Gottsegen (In re Mi-Lor Corp.)*, 233 BR 608, 613-614 (Bankr. Mass 1999) (holding that the tolling under section 108 (a) of the Bankruptcy Code and the tolling under the fraudulent concealment doctrine were sufficient

to deny defendants' motion for summary judgment), *reversed and vacated in part*, 348 F3d 294 (1<sup>st</sup> Cir 2003) (proceeding remanded to the trial court for a determination whether the release executed in favor of certain defendants was enforceable).

Similarly, in *Barr v Charterhouse Group Intl., Inc. (In re Everfresh Beverages, Inc.)* (238 BR 558 [Bankr SD NY 1999]), the trustees appointed under the debtors' plan of liquidation, on behalf of creditors of the estates, brought actions against insiders of the debtors, seeking to avoid allegedly fraudulent conveyances pursuant to sections 544 and 546 of the Bankruptcy Code and, by incorporation, New York's fraudulent conveyance law and Debtor and Creditor Law. In response to defendants' argument that the action was time barred, the trustees contended, among other things, that section 108 (a) of the Bankruptcy Code extended the time to commence the action because they did not discover the basis of their claims until much later, and that the doctrine of equitable tolling, as well as defendants' fraudulent concealment, allowed the claims to be filed beyond the otherwise expired limitations period. *Id.* at 572, 576-578. The court agreed, and held that because "the doctrine of equitable tolling" and "the tolling principles of fraudulent concealment" involved questions of fact that could not be resolved without a trial, defendants' motion to dismiss on the ground of untimeliness was

denied. *Id.*;<sup>2</sup> see also *Pereira v Centel Corp. (In re Argo Communications Corp.)*, 134 BR 776, 784-791 (Bankr SD NY 1991) (holding that section 108 (a) extended the limitations period for the trustee to bring fraudulent concealment claims under state common law); *Eisenberg v Feiner (In re Ahead By A Length, Inc.)*, 100 BR 157, 162-164 (Bankr SD NY 1989) (applying section 108 (a) to extend the time for the trustee to assert fraudulent concealment claims, and denying defendant's motion to dismiss).

Apart from federal court decisions rendered in bankruptcy cases, the courts of the State of New York, including the Appellate Division, Second Department, also recognize the automatic tolling under section 108 (a) of the Bankruptcy Code, in the context of addressing state substantive and procedural laws. See e.g., *Zinker v Makler*, 298 AD2d 516 (2<sup>nd</sup> Dept 2002) (addressing bankruptcy tolling in the context of a property foreclosure action); *Weiner v Sprint Mortgage Bankers*, 235 AD2d 472 (2<sup>nd</sup> Dept 1997) (noting bankruptcy tolling in the context of

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<sup>2</sup> In addressing section 108 (a), the court interpreted the statute narrowly as permitting the trustee to pursue claims in the shoes of the debtor only, but not on behalf of the creditors. The court also opined that, based on the unique facts of that case, the limitations period for fraudulent conveyance claims under section 546 of the Bankruptcy Code was more applicable than the general extension or tolling of time under section 108. *Id.* at 572-573. These rationales are inapplicable to the facts of this case, to the extent that the medical malpractice action was commenced by the trustee in the name of debtor Kremen, and this case does not involve fraudulent conveyance claims or the application of sections 544 and 546 of the Bankruptcy Code.

forged endorsements of negotiable instruments under the Uniform Commercial Code). Although these cases do not involve fraudulent concealment claims, they recognize the bankruptcy tolling of the limitations period, when the time for commencing state law claims based on applicable nonbankruptcy law (substantive or procedural) has not expired at the time of the debtor's bankruptcy filing.

#### Estoppel/Fraudulent Concealment

The tolling of the statute of limitations, in the face of a fraudulent concealment claim, was addressed in *Harkin v Culleton* (156 AD2d 19 [1<sup>st</sup> Dept 1990]). In *Harkin*, the plaintiff alleged that he underwent unnecessary radiation and chemotherapy treatment because his doctors misdiagnosed a brain tumor as malignant when it was benign, and then concealed the misdiagnosis. In determining whether to apply estoppel, based on fraudulent concealment, the Court looked at whether the action "was commenced within a reasonable time after the facts giving rise to the estoppel ceased to be operational." *Id.* at 23. To determine that issue, the Court stated that a court must "determine first, as a matter of fact, when the deception ceased to be operational, and second, as a matter of law, what constitutes a reasonable period of time in which to have commenced an action for malpractice." *Id.*

Accordingly, the Court wrote, with respect to one doctor (Cullerton) that:

[W]e have no trouble in holding that plaintiff's service of a summon and complaint on Cullerton on June 19, 1985, 2 ½ months after expiration of the statute of limitations [for commencing a medical malpractice action under CPLR 214-a], constituted due diligence as a matter of law, assuming that plaintiff, as he asserts, first learned that the tumor was benign only 6 ½ months before, on December 5, 1984.

*Id.*. The Court further held that with respect to another doctor, McMurtry, that "there is as much reason to hold the action timely against McMurtry as there is against Cullerton" where process was served on that doctor "some 10 months after expiration of the Statute of Limitations but *only* 3 ½ months after plaintiff learned that the tumor was benign." *Id.* at 24 (emphasis added).

#### Application of Estoppel and Bankruptcy Tolling To This Action

Defendants have not met their burden to demonstrate that the medical malpractice action would have been untimely, had it been filed within six months of Kremen learning of the alleged fraudulently concealed mis-diagnosis.<sup>3</sup> As noted in *Harkin*, the Court must determine the date on which the facts giving rise to the estoppel ceased to be operational. Defendants do not dispute Kremen's claim that she first learned of Dr. Kaiser's fraudulent concealment of the mis-diagnosis on April 14, 1999. In fact,

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<sup>3</sup>Although Kremen did not file a medical malpractice action within six months of April 14, 1999, but rather, filed a bankruptcy petition, the relevant inquiry under bankruptcy law requires a determination of whether the action *would* have been timely *had* it actually been filed.

Defendants would be hard pressed to dispute this claim as they propounded the argument against the malpractice defendants in the medical malpractice action. Moreover, in the decision on the appeal of the underlying medical malpractice action, the First Department stated that "plaintiff failed to commence the action within a reasonable time after the estoppel ceased to be operational ... Plaintiff admits that she became aware of the alleged misdiagnosis on April 14, 1999, when she took her medical records to another reconstructive surgeon." Accordingly, for purposes of this motion, April 14, 1999 is the date that the facts giving rise to the estoppel ceased to be operational.

The next question to be addressed is what period of time, after April 14, 1999, constitutes a reasonable period for commencement of a medical malpractice action. In *Harkin*, the First Department found that plaintiff acted with due diligence, as a matter of law, where he sued one doctor within 6 ½ months of learning of the alleged concealment. Similarly, here, Kremen filed for bankruptcy within 6 months of learning of the alleged concealment.<sup>4</sup> Thus, this Court cannot find, as a matter of law,

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<sup>4</sup>Although the *Harkin* plaintiff commenced her action against that doctor within 2 ½ months after the expiration of the statute of limitations, and Kremen filed for bankruptcy within 1 year 9 months of the expiration of the statute of limitations, the difference is not determinative. The First Department also found that, concerning a second doctor, the action was not time-barred merely because service of process was made "some 10 months after expiration" of the statute of limitations and "only 3 ½ months after plaintiff learned that the tumor was benign." *Id.* at 24

that the time for commencing the medical malpractice claim had already expired when Kremen filed for bankruptcy. Nor do Defendants cite any relevant cases to support such an argument. Accordingly, the Court cannot find that Kremen was not entitled to receive an additional two years in which to commence the medical malpractice action under section 108 (a) (2) of the Bankruptcy Code, (i.e., until October 14, 2001). Given that the action was commenced by the trustee on July 21, 2001, Defendants have not met their burden to show that their failure to assert the bankruptcy tolling of the statute of limitations in the medical malpractice action could not have, as a matter of law, deprived Plaintiffs of a judgment in their favor. Accordingly, it is

ORDERED that Defendants' motion seeking dismissal of this malpractice action is hereby denied.

**This constitutes the Decision and Order of the court.**

Dated: April 27, 2007

ENTER:

  
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J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
MAY 09 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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(emphasis added).