

**Fleming v Vassallo**

2005 NY Slip Op 30273(U)

December 20, 2005

Supreme Court, New York County

Docket Number:

Judge: Harold B. Beeler

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

PRESENT: HAROLD BEELER  
J.S.C.  
*Justice*

PART 9

Index Number : 111201/1995

FLEMING, JANE

vs

VASSALLO, JOHN ESQ.

Sequence Number : 16

DISMISS ACTION

INDEX NO. 111201/1995

MOTION DATE 01/6

MOTION SEQ. NO. 016

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

**FILED**

JAN 03 2006 is motion to/for \_\_\_\_\_

**NEW YORK COUNTY CLERK'S OFFICE**

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is resolved*

*in accordance with the Order annexed.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/20/05

*Harold B Beeler*

**HAROLD BEELER**  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

At IAS Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 20<sup>th</sup> of December, 2005.

**PRESENT:     HON. HAROLD B. BEELER,**  
Justice

JANE FLEMING,  
Plaintiff,  
-against-

JOHN VASSALLO, ESQ., an Attorney at Law of the State of New York, FRANKLIN, WEINRIB, RUDELL & VASSALLO, P.C., Attorneys at Law of the State of New York, LEONARD FRANKLIN, ESQ., an Attorney at Law of the State of New York, and MITCHELL I. RUDELL, ESQ., an Attorney at Law of the State of New York,  
Defendants.

INDEX NUMBER 111201/95  
Motion Sequence 016  
**DECISION & ORDER**

**FILED**  
JAN 03 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants John Vassallo and Franklin, Weinrib, Rudell & Vassallo, P.C. ("Franklin Weinrib") move for summary judgment in their favor dismissing the complaint and awarding them on their counterclaim legal fees of \$108,392.12 plus interest and costs of collection. Plaintiff Jane Fleming opposes. Leonard Franklin and Mitchell I. Rudell, members of Franklin Weinrib, were discontinued from the action by stipulation in 1998.

**The Malpractice Claim**

This is a legal malpractice action arising out of defendants' representation of Jane Fleming in a divorce action between plaintiff and her ex-husband David Swersky. She claims defendants directed her to reject a purported settlement offer of \$2.5 million made by Swersky in December, 1987, and

that, after protracted and expensive litigation, she ultimately received far less than what had been offered. Specifically, the Complaint ¶ 8 states: "In or about December 1987, at a conference attended by counsel for both parties, David Swersky made an offer of settlement of an approximate value of \$2,500,000 to Plaintiff, consisting of cash, real estate and a 50% interest in the marital home. Defendant Vassallo, over the objections of Plaintiff, directed Plaintiff to reject the offer." Fleming, in her affidavit in opposition to this motion dated February 13, 2005 ("Fleming Affidavit") ¶ 16, echoes her complaint made 10 years earlier:

At our first conference attended by counsel for both parties, David Swersky made an offer of settlement of what was believed then to be an approximate value of \$2,500,000, consisting of real estate and a 50% interest in the marital home. This was not inconsistent with the Cote Basque agreement which I originally presented to Mr. Vassallo . . . [who] vociferously admonished me at the time that he was in charge of the case and, over my objections, directed me to reject the offer.

### **The Cote Basque Agreement**

Swersky testified that, at a luncheon at the Cote Basque restaurant sometime prior to March 5, 1987, the date he filed for divorce from her, he discussed with Fleming a proposed separation agreement. "I was going to give her money and properties totaling what I believed to be \$2-1/2 million and I assured her that I would always be responsible for John's<sup>1</sup> education." Swersky Trans., July 7, 2000, 417:22-25. In a hand-written note to Fleming, dated March 6, 1987, Swersky stated, "I stand by our Cote Basque agreement." Exhibit 2 to Fleming Affidavit. When Swersky first met Vassallo, "our goal was to present [the] Cote Basque agreement, walk Mr. Vassallo through my assets so he could have a better understanding of what we had offered and what the deal was and what we wanted to be written up finally." Swersky Trans., June 6, 2002, 564:13-17.

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<sup>1</sup>John was Fleming's son from an earlier marriage whom Swersky adopted.

What plaintiff calls “the very real Cote Basque agreement” (Fleming Affidavit ¶ 29) is at the heart of the instant action even though the term never appears in the Complaint. “In 1987, I approached Defendant [Vassallo] to expedite the final settlement of my divorce in a manner consistent with an agreement worked out between my husband and myself. All I wanted Mr. Vassallo to do was to put the agreement into legal form and conclude the matter so that I could get on with my life.” *Id.* ¶¶ 2-3. However, Vassallo, “over the objections of Plaintiff, directed Plaintiff to reject the offer, . . . [and] undertook a course of protracted and expensive litigation . . . [in spite of] indications of David Swersky’s deteriorating financial condition.” Complaint ¶¶ 8-11. By the time the “settlement of financial issues was negotiated directly between Plaintiff and David Swersky with little or no help from Defendant Vassallo . . . due to David Swersky’s financial difficulties, Plaintiff has received nothing from him, with the exception of the infrequent payments of alimony and the payment of utility bills, medical bills and health insurance.” *Id.* ¶¶ 14-15.

An examination of the very detailed record in this prolonged action eliminates any triable issue of fact as to the viability of the Cote Basque agreement or anything similar as a defined course of action such that an experienced attorney only had “to put the agreement into legal form.” The contemporary record for 1987-88 when the critical events allegedly occurred, while not refuting that the term “Cote Basque agreement” may have had meaning to the divorcing couple, much more so to Swersky than Fleming, offers no sense of the contents of the agreement as understood or understandable by anyone else. No document pretending to be the Cote Basque agreement has been produced at any time; Fleming and Swersky are uncertain that it ever was put in writing; and, no one else, including various lawyers on either side in the matrimonial action, claim to have seen a written document or to have knowledge of the contents of the agreement.

Aside from the testimony of Fleming and Swersky, there are only 3 pieces of independent evidence about the Cote Basque agreement:

- 1) The handwritten note from Swersky to Fleming delivered on the same day as service of process for the divorce action, March 6, 1987, stating: "I stand by our Cote Basque agreement."
- 2) A handwritten note to himself by Vassallo at or soon after a meeting with Swersky and his attorney stating: "See Cote Basque agreement."
- 3) Deposition testimony of Edna Berk Kuhn, Swersky's matrimonial attorney from 1986 through June 1988,<sup>2</sup> who was told by Swersky that the couple "had agreed on the terms and it was satisfactory to both. . . . [T]hey apparently had met at a restaurant, Cote Basque, and they called it the Cote Basque agreement or details or something like that." Kuhn Trans., July 22, 2002, 38:10-19. Additionally, she testified about a meeting held in June 1988 with Swersky and the attorney succeeding her where the Cote Basque agreement was discussed according to her cryptic notes of the meeting: "[M]y understanding was that Jane and David, when they were at Cote Basque, made up their agreement, and this was back in '86 and it concerned the property and maybe it concerned support, too." *Id.* 233:4-8.

### Plaintiff's Testimony

Fleming, who brought this complaint in 1995 without mentioning the Cote Basque agreement by name, was confused about the Cote Basque agreement when deposed more than a decade after the March 6, 1987 note placed it at the center of the divorce proceeding. The restaurant itself was located at the time at 5 East 55<sup>th</sup> Street between Fifth and Madison Avenues near Swersky's law offices. At her deposition on July 14, 1998, Fleming recalls settlement discussions that by time and place appear not to be the Cote Basque agreement.

[Fleming, Swersky and counsel met the day before the deposition and] discussed and retraced the steps we had taken to arrive at that figure [of \$2.5 million] and where we met, and I believe at a restaurant called Island on Madison Avenue between 92<sup>nd</sup> and

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<sup>2</sup>Kuhn, who worked at the same firm with Swersky in the 1970s, handled Swersky's adoption of Fleming's son after going into private practice specializing in family law. In the fall of 1986, Swersky called Kuhn and came to her office (probably on September 26, 1986) to discuss divorcing Fleming. Kuhn Trans., July 22, 2002, 38:2-7, 48:12-49:10. They signed a retainer agreement on October 23, 1986.

93<sup>rd</sup> streets, David and I, to discuss that; we remembered that together. We remembered it independently and then shared that memory.

Q. The restaurant's name is?

A. Island.

Q. Do you recall when that meeting was with Mr. Swersky? Was that before or after he served you with the summons?

A. I don't – in the summer, it was in the – I believe in the summer of 1987.

Q. So that would have been after he served you with the summons?

A. Yes.

(Fleming Trans., July 14, 2002, 29:23-30:15).

[W]e discussed it [the settlement proposal] at Island, we did discuss it with Edna, Edna knew about it, we were in agreement that we did not this to be an extended situation, that we were not – we did not have feelings of acrimony.

(*Id.* 30:25-31:5).

[Regarding the meeting the day before this deposition.] We talked about the meeting at Island; we talked about the conversation with Edna Kuhn . . . [when Swersky] was in Edna Kuhn's office, I was on the telephone.

(*Id.* 52:20-53:2).

Ultimately, the terms and conditions of the alleged agreement are far more important than the time and place it was negotiated. However, the complaint rests on the claim that Vassallo directed his client to reject a tangible offer, an offer that Fleming argues that she previously acceded to.

Regardless of Fleming's recollections about the details of the agreement, the issue here is what Vassallo knew and what he did.

### **Lawyers' Evidence**

Prior to hiring Vassallo in October 1987, Fleming had 2 other lawyers in succession from the commencement of the matrimonial action. Her first attorney was Lorraine Backal who ended her representation in September 1987 in order to run for a judicial seat and was succeeded briefly by Anthony Burton. On October 19, 1987, Backal wrote to Burton enclosing the "papers I was able to locate" on the matter, only the summons with notice dated March 5, 1987 and the Swersky note dated March 6, 1987. Exhibit 25 attached to Affirmation of Philip Touitou ("Touitou Affirmation").

Additionally, Backal wrote, "I did speak to Edna Kuhn who indicated the matter could be settled, but I did not receive instructions from Jane as to how she wanted to proceed and whether she wanted me to appear for her. Thus, the action was placed on 'hold.'" *Id.* Nothing in this letter from Backal, whom Fleming described in a letter to her dated September 17, 1987 (Exhibit 19 attached to Touitou Affirmation) as "a fountain of encouragement and support over the years," suggests an explicit or implicit settlement agreement between Fleming and Swersky known to Backal.

Burton, now retired from practice, in an affidavit submitted by defendants in reply, states:

At no time during my representation of Ms. Fleming (nor at any other point in time) did it come to my knowledge that she and Mr. Swersky had reached a concrete divorce settlement concerning spousal support or the division of the couple's marital property. No documents were ever prepared by me or, to my knowledge, by anyone else, memorializing any divorce settlement between Ms. Fleming and Mr. Swersky. Ms. Fleming never asked me or, to my knowledge, anyone else, to prepare any such documents.

Kuhn was deposed on July 22, 2002. She had closed her office 7 or 8 years earlier, destroying or discarding some files. She produced either voluntarily or under court order all other documents she held on the Swersky divorce except for 34 pages of her handwritten notes protected as attorney work product. None of the documents produced resembled a proposed settlement agreement of any authorship nor did she claim they did. She did not recollect preparing a settlement agreement for the couple at any time during her representation of Swersky. Kuhn Trans., July 22, 2002, 228:18-229:3.

According to Kuhn's testimony, Swersky told her about the Cote Basque agreement at one of their early meetings. After 15 years or so she could not recall at which meeting the subject was introduced or the "financial terms or even the particular property." Kuhn Trans., July 22, 2002, 39:22-40:2. Kuhn spoke to Fleming on the telephone shortly after the initial meeting with Swersky because the couple hoped that Kuhn would represent both of them in the matrimonial action. Kuhn

testified that she told Fleming that Kuhn could not represent both parties and that Fleming should secure her own counsel. They did not discuss the Cote Basque agreement or the couple's finances generally in that telephone conversation. *Id.* 42:20-43:4. It seems to have been the only private conversation Kuhn and Fleming had while Kuhn represented Swersky.

Kuhn further testified that she and Jane, separately, had told Backal about the proposed settlement offer and Backal "was very satisfied." Backal "said she thought the offer was a good one, a generous one and that in her experience it was not a good idea to play around with good offers and that we should go ahead with it." *Id.* 69:16-70:21. Nothing in the few lines Backal wrote to Burton on October 19, 1987, the only record of Backal's point of view, reflected such optimism. Kuhn did not recall memorializing that conversation and produced no document that did. *Id.* 73:11-76:5.

She testified that when she met with Marvin Gersten, Swersky's new lawyer, in June 1988, she told him no agreement was then in place, but "when we started they [the couple] had an agreement." *Id.* 226:25-227:17. While she did not remember whether anything in the file she handed over to Gersten was specific to a proposed settlement, defendants questioned her about notes in her handwriting that she either made during the meeting or brought to the meeting also attended by Swersky. Kuhn 232:19-235:11. The notes say in part, "Also part of the Cote Basque settlement," "Paying off the mortgage." They also contain numbers, such as 76, 82 and 87, which might represent dollar amounts likely in the thousands or streets where Swersky had property interests.

Throughout her testimony Kuhn could not recall preparing a draft settlement agreement, being asked to prepare one or receiving one from any of Fleming's attorneys.

In sum, none of the attorneys involved with the matrimonial action on either side from its commencement until mid-1988, when Fleming moved for dismissal of the action and *pendente lite*

relief drafted, was asked to draft, read or received a written settlement agreement. Only Kuhn recalls in general that the couple had an agreement based on information provided her solely by Swersky. Gersten, who succeeded Kuhn, was never deposed.

### Documentary Evidence

No document has been produced that does more than mention the term Cote Basque agreement. Only Kuhn's notes associated with her meeting with Gersten and Swersky use the term Cote Basque agreement on the same page with numbers (possibly dollar amounts or addresses) that might be part of a deal although she was "not absolutely sure" or "not sure" how to interpret them when questioned. Kuhn 232:21-233:16.

Fleming, in her testimony, was a little more certain than the attorneys that the settlement agreement was committed to writing. When asked whether she had ever prepared "a writing identifying with specificity the various components" of Swersky's proposed settlement, she replied: "I did, I believe; I did it on a computer that went pop." Fleming Trans., July 14, 1998, 126:17-22. It was her "inclination to make hard copies . . . [and] probably [one] was made." *Id.* 129:4-6. She was asked to look for a copy if she still had it, but she was not able to find it or a computer disk containing backup data by the time the deposition continued six months later. Fleming Trans., January 28, 1999, 173:11-23. She abandoned the computer when she moved to another apartment.

Fleming recalled that she told Vassallo about the offer at a meeting in his office and "he was pretty careful about making notes about things that you were telling him in meetings." Fleming Trans., July 14, 1998, 128:3-21. She also had a "vague and somewhat hazy recollection" that Kuhn had written down the offer. *Id.* 129:16-130:4. At the second session of her deposition, she stated that "I believe that Edna Kuhn has a piece of paper [memorializing the proposed settlement agreement]."

Fleming Trans., January 28, 1999, 174:9-12. Her basis for saying that was “David Swersky told me she has that.” *Id.* 175:5-9.

She believed that Kuhn sent a copy of the proposed settlement offer to Backal and that “Lorraine Backal may have shown it to me. I know Lorraine and I discussed it. I believe she had a copy of it.” *Id.* 130:12-131:15. The only other time she saw a written copy of the proposed settlement agreement was a few years before the deposition, but after commencement of the instant action. *Id.* 132:5-12. Swersky showed it to her at a private meeting, but did not give her a copy. *Id.* 132:4-23.

In sum, Fleming’s testimony about a written record of the proposed settlement agreement is the following:

- Swersky told Fleming that Kuhn had one.
- Fleming believed that Backal had a copy of it sent by Kuhn.
- Fleming may have printed a subsequently-unlocateable record of the agreement from her computer before it stopped working.
- Once, sometime closer to 1995 than 1999, Swersky showed her a copy of the proposed agreement.

The only evidence from Backal, the letter to Burton, does not support Fleming’s belief. More significantly, Kuhn, in her testimony, while supporting the idea of a Cote Basque agreement, never asserted that she drafted, produced, read or handled a written record of the proposed settlement agreement.

Swersky was deposed on five occasions over 2 years amounting to 650 pages of testimony. He spoke frequently about the Cote Basque agreement, but never said that it was put into writing. He was asked a direct question on point only once it seems. “Q. By the end of 1987, had you furnished to Mr. Vassallo a written marital settlement agreement that incorporated the financial proposal that

you conveyed to Ms. Fleming at the Cote Basque restaurant? A. I don't recall." Swersky Trans., June 6, 2002, 578:20-25.

The Court finds that a proposed settlement agreement for the couple was never committed to writing during the period when Kuhn represented Swersky, late-1986 through mid-1988.<sup>3</sup> That certainly does not eliminate the possibility that Vassallo was informed adequately of the couple's understanding through conversation. Vassallo denied that he received any specific information from Fleming about a proposed settlement offer. He testified that Fleming informed him of the Cote Basque agreement, but he did not recall that it was detailed. "I think her husband had given her an assurance at some point that he would endeavor to keep her in her residence and to continue supporting her at a certain level. My memory is that it wasn't a formal agreement. It was some sort of assurance he had given her over dinner." Vassallo Trans., March 16, 1999, 12:35-13:7. However, Fleming insisted that Vassallo failed "to expedite the final settlement of my divorce in a manner consistent with an agreement worked out between my husband and myself."

### The Critical Conference

Regardless of how well informed Vassallo might have been about his client's initial intentions, her complaint is clear about how she was allegedly ill-served by her attorney. "In or about December 1987, at a conference attended by counsel for both parties, David Swersky made an offer of settlement of an approximate value of \$2,500,000 to Plaintiff, consisting of cash, real estate and a

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<sup>3</sup>By the time Kuhn ended her representation of Swersky, June 1988, his financial condition had changed sufficiently, by his own admission. In his affidavit opposing Fleming's *pendente lite* motion, Swersky stated "I was once a wealthy man, and lived a lifestyle accordingly, but all of that has changed since shortly after the stock market crash in [October] 1987." By early 1988, according to Fleming, Swersky's checks were bouncing and "I was clearly aware that David's financial situation was more, was more than precarious, but was dangerously – we were, we were in serious trouble." Fleming Trans., July 14, 2002, 65:22-25. Accordingly, an examination of the disputed events must focus on the period of Kuhn's representation because a generous settlement offer after that would not have been credible and none was made.

50% interest in the marital home. Defendant Vassallo, over the objections of Plaintiff, directed Plaintiff to reject the offer.” Complaint ¶ 8. “At our first conference attended by counsel for both parties, David Swersky made an offer of settlement of what was believed then to be an approximate value of \$2,500,000, consisting of real estate and a 50% interest in the marital home . . . and [Vassallo,] over my objections, directed me to reject the offer.” Fleming Affidavit ¶ 16. These two statements, a decade apart, are consistent and near duplicative. According to Fleming’s testimony, however, a meeting of Fleming, Swersky, Kuhn and Vassallo never took place. “I don’t believe I was present at that meeting. . . . Q. So you don’t recall attending a meeting in December of ‘87 at which this [settlement] was discussed . . . ? A. I do not.” Fleming Trans., January 28, 1999, 230:12-231:2. Swersky confirmed this. “When we finally did meet, which I believe was after Thanksgiving [1987], Jane was not in attendance. It was three of us [Vassallo, Kuhn and Swersky].” Swersky Trans., June 27, 2000, 236:9-11.

There is evidence that the first time opposing counsel met was April 1988 with only Swersky present. Kuhn sent Swersky an invoice dated July 7, 1988 including “meeting on April 7 with John Vassallo and David.” An earlier invoice, dated February 11, 1988, covering the period January 1987 to February 11, 1988, includes office conferences with Swersky, but only telephone discussions with Vassallo. The “Prebill Control Report” submitted by defendants shows all of Franklin Weinrib’s time entries for “Jane Swersky” from 10/26/87 to 10/31/88. On April 7, 1988, Vassallo has an entry of 2.20 hours for “Conference D.S., atty.” There are no other entries mentioning D.S. or Swersky.

Fleming had no personal knowledge of the meeting whenever it occurred. “I guess it would be that David Swersky may have told me about that.” Fleming Trans., January 28, 1999, 229:22-

230:13. Swersky agreed. "Q. So how did she know what went on at the meeting? A. Because I spoke to her before the meeting, I spoke to her after the meeting." Swersky Trans., 250:3-6.

In spite of the ambiguous wording of Fleming's complaint and affidavit, no one asserts that Fleming ever attended a meeting with Swersky, Vassallo and Kuhn for any purpose. The implication, therefore, that Vassallo publicly impeded the settlement process is not factual.

### **Vassallo's Conduct**

The passage of time seems not to have been kind to Fleming as Swersky's financial position declined while efforts to effect a divorce settlement were underway. The commercial real estate and stock markets, the basis of Swersky's wealth, suffered steep declines in late 1987 as Swersky testified. None of the lawyers or principals anticipated these events or had reason to, and none can be held responsible for acting reasonably in the face of them. However, Swersky's conduct rather than Vassallo's was the cause of costly delay as Swersky failed to comply with Vassallo's disclosure demands. "It is true I did not provide immediate full discovery once this action began. . . . I naively thought I could shortcut the process by making settlement offers (which happened to have been very generous) without bothering with the paperwork. I was wrong. I now understand that Jane's attorneys could not make any agreement until they saw everything, and I have acted accordingly." Swersky Affidavit, November 20, 1989 ¶ 28n.

Vassallo apparently sought disclosure as soon as he was retained by Fleming. In a letter to Kuhn, dated December 18, 1987, he wrote, "I am puzzled by your failure to furnish to me financial information which I requested some six weeks ago." Exhibit 4 to Touitou's Affirmation. Even though Swersky cancelled Fleming's credit cards, Vassallo maintained a conciliatory tone. "Mrs. Swersky is very anxious to reach a prompt and amicable settlement. She has no intention to be unfair.

My requests for financial information, as you know, are entirely appropriate and necessary. For me to advise Mrs. Swersky without that information would be professionally irresponsible.” *Id.* Such disclosure is required by New York Domestic Relations Law § 236(2): “In all matrimonial actions and proceedings commenced on or after September first, nineteen hundred seventy-five in supreme court in which alimony, maintenance or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states.” *Rubin v. Rubin*, 87 A.D.2d 587 (2d Dep’t 1982) (“the parties must be granted a searching exploration of each other’s assets and financial dealings, including their interests in business entities, at the time of and during the marriage”).

New York law also prevented the Cote Basque agreement or anything similar from having the force of law. “An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.” Domestic Relations Law § 236(B)(3). “[P]arties in the midst of a divorce proceeding should not be able to obtain retroactive validation of a postnuptial agreement. An insistence upon the formalities mandated by the Legislature requires that the parties have contemporaneously demonstrated the deliberate nature of their agreement.” *Schoeman, Marsh & Updike, LLP v. Dobi*, 264 A.D.2d 572, 573 (1<sup>st</sup> Dep’t 1999).

Had defendants ignored either provision of Domestic Relations Law § 236, Fleming would have a genuine cause of action for legal malpractice.

### **Conclusion**

Some time before Swersky commenced the action to divorce his wife, they no doubt discussed financial issues. Swersky’s memory for details in this regard is stronger than Fleming’s. Her

testimony approaches Vassallo's that Swersky promised to take care of her and their son, keeping them in a suitable residence and providing adequate support. There is no evidence that Fleming conveyed sufficient detail about these promises to any of her three lawyers allowing them either to draft a settlement agreement or approve one from Swersky.

Additionally, it is clear that she never witnessed Swersky making any promise or offer to Vassallo in her behalf. Although the complaint speaks of "a conference attended by counsel for both parties" and Fleming's Affidavit speaks of "our first conference attended by counsel for both parties," leaving the impression that Fleming was sitting with Swersky, Kuhn and Vassallo, Fleming never met with the three together. The statements that "Vassallo, over the objections of Plaintiff, directed Plaintiff to reject the offer" (in the complaint) and that Vassallo "vociferously admonished me at the time that he was in charge of the case and, over my objections, directed me to reject the offer" (in the affidavit) are not connected by evidence to any time or place other than the phantom meeting.

#### **Counterclaim for Legal Fees**

Fleming received and retained defendants' invoices, but never paid them. Defendants received only a \$5,000 retainer and a court award of \$12,500 in 1989. With the dismissal of plaintiff's complaint for legal malpractice, it is appropriate that she now pay her legal fees. *Moses & Singer L.L.P. v. S&S Mach. Corp.*, 251 A.D.2d 271 (1<sup>st</sup> Dep't 1998).

Accordingly, for all the reasons stated above, defendants' motion for summary judgment in their favor is granted.

**WHEREFORE**, it is hereby

**ORDERED**, that defendant's motion for summary judgment is granted and the complaint against them is dismissed; and it is further


**ORDERED**, that the Clerk is directed to enter judgment in favor of defendants John Vassallo and Franklin, Weinrib, Rudell & Vassallo, P.C. and against plaintiff Jane Fleming in the sum of \$108,392.12, with interest as prayed for allowable by law until the date of entry of judgment, as calculated by the Clerk and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED**, that defendants shall submit directly to the Court on notice an affidavit detailing additional costs of collection, if any, on or by January 31, 2006.

This is the Decision and Order of the Court.

**DATE:**        **December 20, 2005**

**ENTER:**

  
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**HAROLD B. BEELER, J.S.C.**  
**HAROLD BEELER**  
**J.S.C.**

**FILED**  
JAN 03 2006  
NEW YORK  
COUNTY CLERK'S OFFICE