

**Kallman v Krupnick**

2007 NY Slip Op 34124(U)

December 19, 2007

Supreme Court, Greene County

Docket Number: 0030797/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

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JAY KALLMAN, Individually and as Distributee and  
Nominated Executor and Trustee of Estate of Ruth  
Kallman, and ROBERT KALLMAN, Individually and  
as Distributee,

Plaintiff,

-against-

SHELDON M. KRUPNICK, JAN D. GOLDMAN and  
KRUPNICK & GOLDMAN,

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJ: 19-03-1015 Index No. 03-0797

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**DECISION/ORDER**

George B. Ceresia, Jr., Justice

The above-captioned action arises out of a series of events which, as relevant here, commenced in the fall of 1999. At that time defendant Krupnick (“Krupnick”), an attorney licenced to practice law in the State of New York<sup>1</sup> met with plaintiffs Robert Kallman (“Kallman”) and Jay Kallman, and their mother Ruth Kallman. The meeting took place in Windham, New York at a restaurant owned and operated by the Kallman family known as China Garden. At that time Ruth Kallman was involved in a lawsuit, as plaintiff, against a nephew of hers (and others) in which she sought dissolution of a longstanding management/partnership agreement (referred to herein as the “Irmix Partnership”) with regard to rental property located 42-43 Ithaca Avenue, Elmhurst, Queens, New York. The Kallmans expressed dissatisfaction with the attorney handling the litigation on behalf of Ruth Kallman, and sought to discharge the attorney and retain Krupnick. Krupnick agreed to take the case, and on November 19, 1999 Ruth Kallman signed a retainer agreement providing for a contingent fee of one third of the recovery. The Irmix Partnership case was eventually settled for \$350,000.00, with the law firm of Krupnick and Goldman allegedly receiving a contingent fee of \$133,000.00. At around the same that the Kallmans requested Krupnick to take over the Irmix Partnership litigation, they also retained Krupnick to attempt to resolve a separate dispute the Kallman’s had in connection with a trust known as

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<sup>1</sup>Defendant Krupnick practiced law with defendant Jan D. Goldman as members of the partnership “Krupnick & Goldman”.

the Irene Hoffman Trust (of which Ruth Kallman was a beneficiary). The matter was eventually resolved and Krupnick, with the Kallman's consent, became trustee of the Trust.

In 2001 Robert Kallman learned of an approved but undeveloped subdivision known as Windy Ridge, which was for sale for the price of \$280,000<sup>2</sup>. Kallman viewed the subdivision as an investment opportunity and mentioned it to Krupnick. At some point Kallman and Krupnick verbally agreed to attempt to acquire the property and develop it together<sup>3</sup>. In January 2002 Krupnick forwarded to Dime Savings Bank an offer signed by both Krupnick and Kallman to purchase the Windy Ridge subdivision. Soon after, Dime Saving Bank was acquired by Washington Mutual Bank<sup>4</sup>. The matter was delayed until early 2003, in part, by reason of the acquisition of Dime Savings Bank by Washington Mutual Bank. On May 17, 2003 Robert Kallman and Jay Kallman met with Krupnick at his office. It is undisputed that during the meeting the Kallmans proposed that Jay Kallman become a one third partner in the project. Krupnick refused to agree to this proposal<sup>5</sup>. On

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<sup>2</sup>The property, located in the Town of Windham, Greene County, New York, consisted of approximately 25 acres with 12 separate townhouse pads and 30 subdivided lots. The original developer had apparently experienced financial difficulties, resulting in Dime Savings Bank, a creditor, acquiring the property (either directly or through a holding company).

<sup>3</sup>The precise terms of the oral agreement are in dispute. There apparently was a loose understanding, however, that Krupnick would contribute his legal services to the venture, and would arrange for some or all of the financing thereof, while Kallman, a licensed realtor, would oversee the development of the project.

<sup>4</sup>The subject real property was owned by Windy Ridge Corporation, a real estate holding company owned (directly or indirectly) by Washington Mutual Bank.

<sup>5</sup>The Kallmans maintain that at the same meeting they voiced their dissatisfaction with Krupnick's efforts to obtain adequate financing for the overall project. Krupnick denies that this

May 21, 2003 the Kallmans sent a letter to Krupnick in which they expressed their disappointment concerning the perceived failure of Krupnick (from their point of view) to obtain necessary funding for the overall project (including both the acquisition phase and the development phase). In the same letter they advised Krupnick that they were retaining new counsel. In a letter dated May 22, 2003 Krupnick responded as follows:

“I am in receipt of your 5/22/03 Fax with regard to the Windham Ridge purchase. I disagree with your statement of the facts and I intend to pursue my interest in the sale of the property as a “Purchaser”. Please be guided accordingly.”

Word quickly reached Washington Mutual Bank of the falling out between Kallman and Krupnick<sup>6</sup>. In a letter dated May 29, 2003 Robert H. Badner, First Vice President and Counsel of Washington Mutual Bank, indicated that Krupnick and Kallman could each submit a proposed purchase contract. By letter dated August 6, 2003, however, Mr. Badner abruptly changed his position and indicated that because he was concerned about exposure of liability by selling to either Krupnick or Kallman separately, the Bank would only entertain a purchase offer signed by both parties<sup>7</sup>.

Despite the falling-out between the Kallmans and Krupnick, they apparently

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topic was ever mentioned at that meeting.

<sup>6</sup>While it is unclear who contacted Washington Mutual Bank first, during his pre-trial deposition Krupnick acknowledged contacting the Bank and expressing his interest in purchasing the property on his own.

<sup>7</sup>Kallman claims that Krupnick threatened Washington Mutual Bank with litigation if it sold the property to Kallman.

continued to negotiate with regard to the purchase of Windy Ridge. On August 15, 2003 Robert Kallman and Krupnick entered into a contract to purchase the subject subdivision through purchase of all of the outstanding shares of Windy Ridge Corporation, title owner of the real property. The closing was held on September 4, 2003. The purchase was financed, in part, through a purchase money mortgage loan of \$129,000.00 furnished by Marilyn Krupnick, Sheldon Krupnick's wife. There were ten outstanding shares in Windy Ridge Corporation. Kallman received five shares, as did Krupnick.

The instant action was commenced on August 15, 2003, the date of the above purchase contract. The first three causes of action seek a declaration, *inter alia*, that the acquisition of shares by Krupnick in Windy Ridge Corporation should be deemed void *ab initio*. It is alleged that Krupnick breached his fiduciary duty as attorney to the Kallmans in violation of Disciplinary Rule ("DR") 5-104 of the New York Code of Professional Responsibility (see 22 NYCRR § 1200.23). Plaintiffs assert that Krupnick, in violation of his fiduciary duty, usurped the business opportunity of his client. In addition, it is alleged in the third cause of action that Kallman was forced to enter into the purchase contract under economic duress (by reason, in part, of the position taken by Washington Mutual Bank that it would require that both Krupnick and Kallman enter into the purchase contract together, and that Washington Mutual desired either to close on the deal or market the property elsewhere). The complaint contains a fourth and fifth cause of action which seek to recover the entire contingent fee paid to Krupnick in connection with his handling of the Irmx

Partnership litigation by reason of fraud and overreaching on the part of Krupnick, and by reason that the retainer agreement was unconscionable. In their sixth and seventh causes of action the plaintiffs seek, respectively, to remove Krupnick from his position as Trustee of the Irene Hoffman Trust, and to compel and accounting of his trust accounts.

Plaintiffs have made a motion for summary judgment on their first three causes of action. Defendant Krupnick opposes the motion and has made a motion for summary judgment dismissing plaintiffs' first five causes of action. Defendants Goldman and Krupnick & Goldman have made a motion for summary judgment to dismiss the complaint<sup>8</sup>.

Turning to plaintiff's first three causes of action, courts have long recognized a cause of action predicated upon breach of the fiduciary duty owed by an attorney to her or his client (see Beltrone v General Schuyler & Company, 252 AD2d 640 [3d Dept., 1998]). As stated in Greene v Greene (56 NY2d 86 [1982]):

“the relationship between an attorney and his client is a fiduciary one and the attorney cannot take advantage of his superior knowledge and position. The basic rule, as stated in an early case (Whitehead v Kennedy, [69 NY 462], p 466), is that ‘an attorney who seeks to avail himself of a contract made with his client, is bound to establish affirmatively that it was made by the client with full knowledge of all the material circumstances known to the attorney, and was in every respect free from fraud on his part, or misconception on the part of the client, and that a reasonable use was made by the attorney of the confidence reposed in him’. Under this rule it is not

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<sup>8</sup>The Court notes that the parties entered into a stipulation with respect to the motions for summary judgment. Under the stipulation it was agreed that all three motions “shall be considered together, and the papers submitted there upon shall be considered part of one record, so that any such Exhibits may be cross-referenced without further duplication.”

necessary for the client to show that the agreement was obtained by fraud or undue influence on the part of the attorney (Matter of Howell, 215 NY 466) although, of course, that would make the agreement unenforceable if it were proven. Even in the absence of such misconduct the agreement may be invalid if it appears that the attorney ‘got the better of the bargain’, unless he can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence in the attorney (Howard v Murray, 38 NY2d 695, 699, 43 NY2d 417, supra).” (Greene v Greene, supra, at 92).

As the Third Department Appellate Division stated in Beltrone (supra):

“an attorney stands in a fiduciary relationship to the client which relationship is imbued with ultimate trust and confidence that imposes a set of special and unique duties, such as ... avoiding conflicts of interest...and honoring the client’s interest over that of the attorney []. Thus, where an attorney enters into a business relationship with a client while also acting as the client’s attorney with respect to the relationship, the attorney must fully and fairly inform the client of the consequences of any action taken in furtherance of the relationship and certainly may not exploit the client’s trust for his or her own benefit” (Beltrone v General Schuyler & Co., supra, at 641, citing Greene v Greene, supra, and Code of Professional Responsibility DR 5-104 [a]; other citations omitted).

In sum, where breach of a fiduciary duty is established in connection with a transaction between an attorney and his or her client, the client may be entitled to an order determining that the contract is invalid, and directing the attorney to relinquish the interest acquired by the attorney through his or her wrongdoing (see Greene v Greene, supra, Sotiriou v Billis, 11 AD3d 672 [2<sup>nd</sup> Dept., 2004]; Schlanger v Flaton, 218 AD2d 597 [1<sup>st</sup> Dept., 1995]<sup>9</sup>)

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<sup>9</sup>In Schlanger the Court set aside and cancelled an attorney's stock and shareholder interest in four corporations that he owned jointly with his client. The Court found that the

DR 5-104, entitled “Transactions between lawyer and client” recites as follows:

“ (a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the lawyer advises the client to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.

“(b) Prior to conclusion of all aspects of the matter giving rise to employment, a lawyer shall not negotiate or enter into any arrangement or understanding:

(1) With a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the employment or proposed employment.

(2) With any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of employment by a client or prospective client.”  
(DR 5-104)

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attorney-defendant had exploited his client through a lack of disclosure, and through actions he took to benefit himself at the expense of his client.

In this instance, there is a triable issue with regard to whether or not, prior to August 15, 2003, Robert Kallman and Krupnick entered into a partnership<sup>10</sup>, a joint venture<sup>11</sup>, or some other arrangement for the purchase and development of the subject real property<sup>12</sup>. If there was a formal business relationship between the parties, then it would appear that Krupnick failed to comply with DR 5-104, since (1) the precise terms and provisions of the business relationship between Kallman and Krupnick were never transmitted to Kallman in writing, (2) Krupnick never advised Kallman to consult independent counsel, and (3) Kallman never consented to the terms of the business relationship in writing. Notwithstanding all of

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<sup>10</sup>“Among the factors to be considered in determining whether a partnership was created are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property, skill or knowledge” (Cleland v Thirion, 268 AD2d 842, 843 [3<sup>rd</sup> Dept., 2000], quotations and citations omitted).

<sup>11</sup>“A joint-venture agreement is generally defined as a special combination of two or more persons wherein some specific venture \* \* \* profit is jointly sought without any actual partnership or corporate designation” (Natuzzi v Rabady, 177 AD2d 620 [2<sup>nd</sup> Dept., 1991], quoting Ackerman v Landes, 112 AD2d 1081, 1082, citing Forman v Lumm, 214 App Div 579, 583 and Chalmers v Eaton Corp., 71 AD2d 721, 722 [other quotations omitted]). “The essential elements are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses” (*id.*, quoting Ackerman v Landes, 112 AD2d 1081, 1082, citing Yonofsky v Wernick, 362 F Supp 1005).

<sup>12</sup>While Krupnick has taken the position that he and Kallman were partners, Kallman takes the position that he only conditionally agreed to enter into a business relationship with Krupnick, the condition being that Krupnick first secure financing for the overall project (both acquisition and development). Notably, in the Court’s view, it does not necessarily follow that just because the Krupnick and Kallman, at one point, submitted a written offer to jointly purchase the property (which was never accepted), that they otherwise continued a formal business relationship.

the foregoing, the Court is mindful that a violation of DR 5-104 does not, of itself, constitute a cause of action (see Guiles v Simser, 35 AD3d 1054, 1055-1056 [3<sup>rd</sup> Dept., 2006]; Schwartz v Olshan Grundman Frome & Rosenzweig, 302 AD2d 193, 199 [1<sup>st</sup> Dept., 2003]).

Krupnick acknowledged in his pre-trial deposition that he was the lawyer for the project. Kallman maintains that Krupnick breached his fiduciary duty as Mr. Kallman's attorney by (1) "insinuating" himself into the deal, and (2) by advancing his own interests over that of his client (in part, by utilizing knowledge of Kallman's relatively weak financial status, which knowledge he allegedly acquired while acting as Kallman's attorney). With regard to the former claim, there is a triable issue with regard to whether (as plaintiffs' allege) Krupnick took advantage of, and/or manipulated Kallman to gradually become a co-purchaser in the proposed acquisition, or whether he was invited into the deal, as Krupnick asserts. With regard to the latter claim, as noted, there is evidence in the record (Krupnick's pre-trial deposition testimony) that after May 22, 2003 Krupnick contacted Mr. Badner of Washington Mutual Bank to indicate that he was prepared to purchase the property on his own. Notably, however, in view of the fact that Kallman was represented by independent counsel from May 2003 forward, and that, notwithstanding all of the foregoing, Kallman still elected to enter into the purchase agreement with Krupnick, there is a triable issue with regard to whether any of the alleged breaches of fiduciary duty on the part of Krupnick caused harm to Kallman. In other words, there is a triable issue with regard to whether Kallman, in entering into the purchase agreement, made an informed and pragmatic business

decision to go forward with the transaction (with the advice of independent counsel, while simultaneously taking advantage of Krupnick's ability to fund the acquisition), thus severing the causal relation between any alleged prior transgression on the part of Krupnick, and the perceived injury to Kallman, thereby extinguishing any entitlement to equitable relief.

The Court concludes that there are triable issues of fact which preclude the grant of summary judgment to any of the parties with respect to plaintiff's first two causes of action.

With regard to plaintiffs' third cause of action "[t]he existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the contract by withholding performance unless the other party agrees to some further demand (see 805 Third Ave. Co. v M. W. Realty Associates, 58 NY2d 447, 451 [1983]; Friends Lumber Inc. v Cornell Development Corporation, 243 AD2d 886, 888 [3rd Dept., 1997]; Bechard v Monty's Bay Recreation, Inc., 35 AD3d 1131, 1132 [3<sup>rd</sup> Dept., 2006]). However, the mere threat by one party to breach a contract does not constitute economic duress (see Eldon Group Am. v. Equiptex Indus. Prods. Corp., 236 AD2d 329 [1<sup>st</sup> Dept., 1997]; Austin Instrument, Inc. v Loral Corp., 29 NY2d 124, 129-131 [1971]).

In this instance, Kallman has taken the position that there was no binding contractual relationship between him and Krupnick. There is no evidence that Krupnick threatened to breach an agreement with Kallman by withholding performance unless Kallman agreed to a further demand. Rather, any alleged duress relates to the falling out between Kallman and Krupnick, and Krupnick's attempts to purchase the Windy Ridge subdivision on his own,

together with requirements imposed by Washington Mutual Bank that the deal close quickly and that Krupnick and Kallman purchase the property together. The Court finds that defendants demonstrated prima facie, the lack of merit of plaintiffs' third cause of action. In the absence of a triable issue of fact, plaintiffs' third cause of action must be dismissed.

Turning to plaintiffs' fourth and fifth causes of action, as noted, plaintiffs seek to recover the attorneys fees paid by their mother Ruth Kallman to Krupnick in connection with the Irmix Partnership litigation. As a starting point, the Court observes that contingent fee agreements are not illegal. As stated in King v Fox (7 NY3d 181 [2006]):

“Contingent fee agreements between attorneys and their clients . . . generally allow a client without financial means to obtain legal access to the civil justice system. In entering into contingent fee agreements, attorneys risk their time and resources in endeavors that may ultimately be fruitless. Moreover, it is well settled that “the client may terminate [the contingent fee agreement] at any time, leaving the lawyer no cause of action for breach of contract” ([Gair v Peck, 6 NY2d 97, 106], at 106) only quantum meruit (see Campagnola v Mulholland, Minion & Roe, 76 NY2d 38, 43-44, 555 NE2d 611, 556 NYS2d 239 [1990]).” (King v Fox, supra, at 192).

It is alleged that Krupnick was guilty of fraud and overreaching in his dealings with Ruth Kallman (plaintiffs' fourth cause of action), and that the retainer agreement was unconscionable (plaintiffs' fifth cause of action). As stated in Pentony v Saxe (2 AD3d 1076 [3rd Dept., 2003]), “[t]o establish a claim [of fraud], plaintiff must show the misrepresentation of a material fact, scienter, justifiable reliance and injury or damages” (id., at 1077, citing Berger-Vespa v Rondack Bldg. Inspectors, 293 AD2d 838, 840 [2002];

see also Snyder v Puente De Brooklyn Realty Corporation, 297 AD2d 432, 435 [3rd Dept., 2002]; Lama Holding Co. v. Smith Barney, 88 NY2d 413, 421). In this instance there was a written retainer agreement. There is evidence that Ruth Kallman was aware that there was an offer of \$250,000.00 to settle the matter at the time Krupnick was retained.<sup>13</sup> There is no evidence of any form of misrepresentation on the part of Krupnick. The written retainer agreement called for an attorneys fee of one third of any recovery. The Court finds that defendants adequately demonstrated, prima facie, the absence of merit of any claim of fraud, concealment, overreaching or misrepresentation on the part of Krupnick in the negotiation of the contingent fee arrangement. In the absence of a triable issue of fact, the Court finds that plaintiffs' fourth cause of action must be dismissed.

Turning to plaintiffs' fifth cause of action, "[an] unconscionable contract [is] one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." (Sablosky v Edward S. Gordon Co., 73 NY2d 133, 138 [1989], quoting Gillman v Chase Manhattan Bank, 73 NY2d 1, 10, quoting Mandel v Liebman, 303 NY 88, 94). It requires an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party (see Matter of State of New York v Avco Fin. Serv. of N.Y., 50 NY2d 383, 389). Kallman acknowledged in his pre-trial deposition that the Kallmans could not afford to pay an attorney at an hourly rate. The contingent fee arrangement was a method

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<sup>13</sup>Plaintiff's Exhibit 25 is a letter dated November 3, 1999 addressed to Ruth Kallman from her former attorney which indicates that Ruth Kallman's nephew had made an offer of \$250,000.00 to settle the Irmx Partnership matter.

of securing an attorney who would continue with the Irmix Partnership litigation. The Court finds that defendants demonstrated, prima facie, that the retainer agreement signed by Ruth Kallman was not grossly unreasonable under all of the surrounding circumstances. Plaintiffs, although clearly unhappy with the fee-arrangement, failed to demonstrate a triable issue of fact. Had Ruth Kallman desired to devise a special fee-arrangement with regard to the \$250,000 offer which was then on the table, she should have taken steps to secure it<sup>14</sup>.

This having been said the Court observes that plaintiffs also assert in their fifth cause of action that Krupnick's attorneys fees were unreasonable. It is alleged in the complaint that Krupnick received \$133,000.00 in attorneys fees in connection with the Irmix Partnership settlement. One Third of \$350,000.00 is \$116,666.66. Neither party presents evidence of the actual sum received by Krupnick as attorneys fees in connection with the Irmix Partnership settlement. While the Court finds that plaintiffs failed to demonstrate a triable issue of fact with regard to the issue of the unconscionability of the retainer agreement, the Court finds that neither party carried their burden with regard to whether the actual attorneys fee paid in the Irmix Partnership litigation was in excess of that specified in the retainer agreement. Thus this portion of the fifth cause of action (with respect to whether the actual attorneys fee paid was in excess of the fee specified in the retainer

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<sup>14</sup>Moreover, and apart from the foregoing, it is uncontroverted that in addition to the \$350,000.00 cash settlement, the Irmix Partnership extinguished a negative \$156,418.00 balance in Ruth Kallman's capital account. On its face, this would appear to be a significant benefit to Ruth Kallman.

agreement) must not be dismissed.

Turning to the status of Jay Kallman as plaintiff, to the extent that Krupnick's motion for summary judgment seeks to dismiss the claims of Jay Kallman, the Court finds that the record demonstrates, prima facie, that Jay Kallman was not in privity with Krupnick in connection with the Windy Ridge subdivision, and is not now a shareholder in the Windy Ridge Corporation. The Court finds, in the absence of a demonstration of a triable issue of fact, that all claims on behalf of Jay Kallman under the first two causes of action (both individually and as Executor and Trustee of the Estate of Ruth Kallman) must be dismissed. With regard to plaintiffs' fifth cause of action, that cause of action inures to the benefit of the Ruth Kallman Estate. Thus all claims of Jay Kallman individually and Robert Kallman individually must be dismissed, leaving the claim of Jay Kallman as Executor and Trustee of the Estate of Ruth Kallman remaining (but, as noted, only with regard to the sole remaining issue of whether or not the compensation which Krupnick received in connection with his handling of the Irmix Partnership litigation on behalf of Ruth Kallman exceeded the amount set forth in their retainer agreement).

The Court now turns to the motion for summary judgment of Jan D. Goldman ("Goldman") and the law firm of Krupnick and Goldman. The Court notes that the first three causes of action seek relief only against Krupnick and not against any other defendant. As such these causes of action should be dismissed as against Goldman and the law firm of Krupnick and Goldman. For the reasons set forth above, the Court finds that Goldman and

the law firm of Krupnick and Goldman are entitled to summary judgment dismissing all of plaintiffs' fourth cause of action, and all of plaintiffs' fifth cause of action, other than that portion of the fifth cause of action which makes claim for attorneys fees paid in excess of that required under the retainer agreement signed by Ruth Kallman in the Irmox Partnership litigation. As noted, plaintiffs' sixth and seventh causes of action seek, respectively, that Krupnick be removed as trustee of the Irene Hoffman Trust, and that Krupnick be required to file an accounting in said Trust. Inasmuch as no relief is requested of Goldman or the law firm of Krupnick and Goldman, the six and seventh causes of action should be dismissed as to these defendants.

Accordingly, it is

**ORDERED**, that plaintiffs' motion for summary judgment on their first three causes of action be and hereby is denied; and it is further

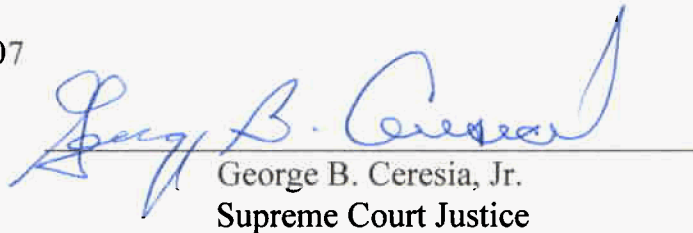
**ORDERED**, the motion of Sheldon M. Krupnick for summary judgment dismissing causes of action first through fifth is granted in part and denied in part as follows: (1) the motion is denied as to plaintiffs' first and second causes of action; (2) the motion is granted as to plaintiffs' third and fourth causes of action, and plaintiffs' fifth cause of action other than that portion thereof which seeks to make claim for attorneys fees paid in excess of that specified in retainer agreement; and (3) the motion is granted to dismiss Jay Kallman, as a plaintiff, both individually and as Executor of the Ruth Kallman Estate, with respect to the first and second causes of action, and to dismiss Jay Kallman in his individual capacity and

Robert Kallman in his individual capacity from the fifth cause of action; and it is further

**ORDERED**, that the motion of Jan D. Goldman and Krupnick and Goldman is granted in part and denied in part as follows: (1) that the motion for summary judgment is granted dismissing the first, second, third, fourth, sixth and seventh causes of action, and all of the fifth cause of action other than that portion thereof which seeks to make claim for attorneys fees paid in excess of that specified in retainer agreement;

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the plaintiffs, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: December 19, 2007  
Troy, New York



George B. Ceresia, Jr.  
Supreme Court Justice

**Papers Considered:**

1. Notice of Motion dated July 25, 2007 of Sheldon M. Krupnick, Esq.
2. Affidavit of John R. Casey, Esq., sworn to July 23, 2007, Supporting Papers and Exhibits
3. Affidavit of Sheldon M. Krupnick, Esq., sworn to July 30, 2007, Supporting Papers and Exhibits
4. Plaintiffs' Notice of Motion dated July 27, 2007, Supporting Papers and Exhibits
5. Notice of Motion dated July 27, 2007 of Defendants Goldman and Krupnick and Goldman, Supporting Papers and Exhibits
6. Affidavit of Jan D. Goldman, Esq., sworn to June 20, 2007
7. Affidavit of John R. Casey, Esq., sworn to August 31, 2007
8. Affirmation of Richard R. DuVall, Esq., dated September 4, 2007
9. Reply Affidavit of John R. Casey, Esq., sworn to September 6, 2007
10. Affidavit of Scott W. Bush, Esq., sworn to September 6, 2007
11. Affirmation of Richard R. DuVall, Esq., dated September 7, 2007