

**Bertoldo v Krangle**

2007 NY Slip Op 34207(U)

December 21, 2007

Supreme Court, New York County

Docket Number: 0120443/2003

Judge: Jane S. Solomon

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

PRESENT: SOLOMON

PART 55

Index Number : 120443/2003

BERTOLDO, PATRICK

vs

KRANGLE, DAVID B., ESQ.

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. 120443/2003

MOTION DATE 10-19-07

MOTION SEQ. NO. 003

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

The following papers, numbered 1 to 9 were read on this motion to/for reargue

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

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

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

PAPERS NUMBERED

1-4

5-7

8-9

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied as

per attached

NB 1-28-08 Pre-Trial conf  
set at end of discussion

**FILED**

DEC 27 2007

COURT CLERK

Dated: 12/21/07

**JANE S. SOLOMON**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

PATRICK BERTOLDO; LILLIAN BERTOLDO,

Plaintiffs,

INDEX NO. 120443/2003

-against-

DAVID B. KRANGLE, ESQ.;  
PARKER & WAICHMAN, ESQS.,

DECISION and ORDER

Defendants.

**FILED**  
DEC 27 2007  
NEW YORK  
COUNTY CLERKS OFFICE

-----X  
JANE S. SOLOMON, J.

This is an action to recover damages for the alleged malpractice of defendants David B. Krangle, Esq. and Parker & Waichman, Esqs. (collectively, "Defendants"), who represented plaintiff Patrick Bertoldo ("Bertoldo") in a personal injury lawsuit. Bertoldo and his wife commenced this lawsuit alleging that although liability was hotly contested in the underlying action, Defendants failed to call an easily locatable and potentially significant eyewitness. On June 20, 2007, Defendant's earlier filed motion for summary judgment under sequence 002 was denied ("Prior Motion Decision"). Defendants now move to reargue that portion of their earlier motion which requested dismissal of plaintiffs' "individual" malpractice claims. For the reasons discussed herein, the motion is denied.

Under New York law, a party seeking to recover damages for legal malpractice must prove the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages. Russo v. Feder Kaszovitz, Isaacson, Weber, Skala & Bass, 301 A.D.2d 63 (1<sup>st</sup> Dep't 2002). In order for a defendant in a legal malpractice case to succeed on a summary judgment motion, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements. Ippolito v. McCormack, Damiani, Lowe & Mellon, 265 A.D.2d 303 (2<sup>nd</sup> Dep't 1999).

A motion to reargue pursuant to CPLR § 2221(d)(2) is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided ... Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. Foley v. Roche, 68 A.D.2d 558, 567-68 (1<sup>st</sup> Dep't 1979).

Defendants contend that reargument is appropriate here because the Prior Motion Decision did not address the portion of their motion that sought to "dismiss" certain factual allegations in plaintiffs' malpractice claims. Specifically, Defendants complain that the Prior Motion Decision did not address their

request for determinations by the Court regarding the credibility of witnesses (Bertoldo in particular), the reliability of plaintiffs' expert witness, and regarding the amount that plaintiffs could have received in settlement of the underlying claim and whether the proposed, but rejected, settlement was reasonable under the circumstances. Moreover, they argue that plaintiffs' malpractice claims are simply criticisms of their trial judgment and strategy, and none of which can be shown to have caused plaintiffs' loss at trial.

However, Defendants' moving papers fail to establish that this Court misapprehended or overlooked the relevant facts or misapplied a controlling principal of law. Although the Prior Motion Decision did not analyze each distinct alleged grievance separately, it held that Defendants failed to show "as a matter of law that their failure to locate and call an eyewitness was a reasonable strategic decision. The witness was deposed in this action, and she gave testimony which could have been favorable to the plaintiffs' position in the underlying action." Plaintiffs' expert also attested that Defendants "departed from good and accepted standards of legal practice in failing to pursue, locate, interview, and disclose to defense counsel the name and address of a significant witness to the incident, whose telephone number was available from the beginning." Thus, because the

failure to call a witness can constitute malpractice (see L.I.C. Commercial Corp. v. Rosenthal, 202 A.D.2d 644 [2<sup>nd</sup> Dep't 1994]), summary judgment was inappropriate under these circumstances.

Defendants also contend that the Court should have separately addressed other arguments they made regarding liability, and should now consider new arguments they believe would have been persuasive. To the extent their papers proffer new arguments not made before, they may not be considered on a motion to reargue. See Foley v. Roche, 68 A.D.2d at 567-68. Since questions of fact identified in the Prior Motion Decision preclude granting summary judgment in Defendant's favor, the other arguments are unavailing. Accordingly, it hereby is

ORDERED that Defendants' motion to reargue is denied; and it further is

ORDERED that counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY on Monday, January 28, 2008 at 2:00 PM for a pre-trial conference.

Dated: December 21, 2007

ENTER:



J.S.C.  
**JANE S. SOLOMON**

**FILED**  
DEC 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE