

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

2009 NY Slip Op 32316(U)

October 5, 2009

Supreme Court, New York County

Docket Number: 101739/06

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 17

Victoria Kremen and Boris Kremen

MOTION INDEX NO. 101739/06

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

MOTION SEQ. NO. 009

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

- v -

Benedict P. Morelli & Associates, P.C. a/k/a  
Morelli Ratner, P.C., Benedict P. Morelli, Esq.,  
David S. Ratner, Esq., Schapiro & Reich, Esqs.,  
Steven Schapiro, Esq., and Perry S. Reich, Esq.

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

PAPERS NUMBERED

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

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

Replying Affidavits: Not accepted as it was not filed.

Cross-Motion:  Yes  No

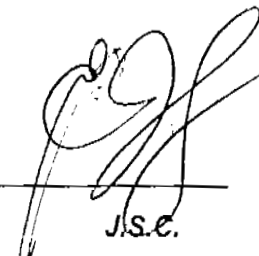
Upon for foregoing papers, it is ordered that this

MOTION IS DECIDED IN ACCORDANCE WITH

THE ACCOMPANYING MEMORANDUM DECISION

**FILED**  
OCT. 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Date: October 5, 2009

  
J.S.C.

EMILY JANE GOODMAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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 : I.A.S. PART 17

-----X  
VICTORIA KREMEN and BORIS KREMEN,

Plaintiffs,

Index No. 101739/06

-against-

DECISION

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

Defendants.

-----X  
EMILY JANE GOODMAN, J.S.C.:

The following illustrates why members of the public may hold cynical views about the legal profession. This motion seeks to renew and reargue denial of a motion to restore a counterclaim for disbursements from defendants' former client. Granted to the extent of considering the present submission; but on reargument the motion is denied.

A legal malpractice action against Benedict P. Morelli & Associates, P.C. (Defendants/Movants) of plaintiff resulted from the representation of plaintiff in a medical malpractice action. In that medical malpractice action, which was dismissed as untimely, Victoria Kremen (Plaintiff/Client) claimed that certain doctors and hospitals misdiagnosed her as having breast cancer, when she did not; the result was an unnecessary bi-lateral mastectomy. (Kremen v. Brower, Index No. 112829/01, Joan B. Carey, Sup Ct NY County 2001, affd, Kremen v

Brower, 16 AD3d 156 [1<sup>st</sup> Dept 2005]). This Court's denial of summary judgment to defendants in the ensuing legal malpractice action which was based on the prior case being dismissed on statute of limitations grounds, was reversed (in connection with a time calculation of Plaintiffs' filing bankruptcy) and the legal malpractice action was dismissed (Kremen v Benedict P. Morelli & Assoc. P.C., 54 AD3d 596 [1st Dept 2008]).

In the legal malpractice action defendants had argued, *inter alia*, that there had been no merit to the medical malpractice case in the first instance, even though they had clearly undertaken the engagement of representing plaintiffs, which suggests that they must have or should have believed it was a meritorious action. Defendants then took the uncommon step in the legal malpractice action, of asserting a counterclaim for disbursements allegedly incurred in the medical malpractice action. However, the law firm submitted to this Court no support whatsoever for the motion to restore their unusual counterclaim.

Now, for the first time, and in violation of motion practice parameters concerning reargument under CPLR 2221, defendants submit a copy of the retainer agreement which was drafted by them and was in their possession when they originally made the motion hereunder. Aside from that impropriety, and despite being an experienced tort firm active in the field of personal injury, defendants obviously are not familiar with the terms of their own retainer agreement.

The retainer provides that “all expenses, costs and disbursements incurred in the prosecution of this action by my attorneys, will be reimbursed as a lien against the total gross recovery of the action.” But since there was no recovery in the underlying medical malpractice action which was dismissed on statute of limitations grounds, there can be no claim for disbursements under the retainer. Movants then rely on the next sentence of the retainer they prepared, “retention of other attorneys in place of Benedict P. Morelli & Associates carries with it the obligation to immediately repay Benedict P. Morelli & Associates all disbursements incurred or advanced.” However, the firm was never replaced in the underlying medical malpractice action. While another firm took the appeal, the retainer does not address representation in connection with an appeal. Where a fee agreement does not reference the taking of an appeal as part of the scope of representation, prosecution of an appeal is not within the scope of the agreement (see Shaw v Mfrs. Hanover Trust Co., 68 NY2d 172 [1986] [no legal fee was owed under a contingency fee agreement after entry of an adverse judgment because the retainer agreement only mentioned prosecuting a claim for damages, not an appeal]; Holzberg v Feuerstein, 104 AD2d 971 [2d Dept 1984] [same]). The “client should be fully informed of all relevant facts and the basis of the fee charges, especially in contingent fee arrangements” and “the onus is upon the lawyers who draft such agreements” to do so with clarity (Shaw v Mfrs. Hanover Trust Co., supra at 176 and 179 [internal quotations and citations

omitted]). Further, an agreement between an attorney and a client must be construed most favorably to the client (*id.* at 177). Accordingly, the fact that the firm was not authorized to take the appeal, does not entitle it to disbursements under the retainer.

Movants' argument in this wasteful litigation is nonsensical and frivolous. The motion to renew is purportedly based on the retainer, which was not produced on the prior motion. That motion was denied for lack of any evidence that Plaintiff agreed to be liable for the expenses. Now that it has been produced, it defeats defendants' argument. Moreover, the firm also, inexplicably, cites cases holding that in the absence of an agreement, the client should bear the burden of paying disbursements. However, movants rely on the existence of an agreement, which agreement makes no provision for the requested relief. "And so it goes."

It is hereby

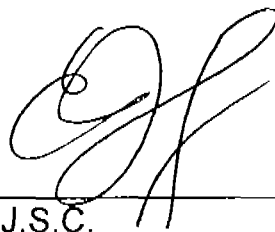
ORDERED that the motion to renew is granted, but on reargument the original decision is adhered to; and it is further

ORDERED that defendants are given the opportunity to submit a memorandum by October 16, 2009, regarding why they should not be sanctioned, fined and ordered to pay legal fees.

[\*6]  
This constitutes the Decision and Order of the Court.

Dated: October 5, 2009

ENTER:



\_\_\_\_\_  
J.S.C.

**EMILY JANE GOODMAN**

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**FILED**  
OCT 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK