

**Morelli Law Firm, PLLC v Perez**

2024 NY Slip Op 33842(U)

October 16, 2024

Supreme Court, New York County

Docket Number: Index No. 150661/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LOUIS L. NOCK PART 38M**

*Justice*

-----X

MORELLI LAW FIRM, PLLC,

Plaintiff,

- v -

MARK PEREZ,

Defendant.

-----X

MARK PEREZ,

Third-Party Plaintiff,

-against-

BENEDICT MORELLI,

Third-Party Defendant.

-----X

INDEX NO. 150661/2022

MOTION DATE 03/12/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595063/2022

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, and 84 were read on this motion to STRIKE PLEADINGS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, it is ORDERED that the motion by plaintiff Morelli Law Firm, PLLC (the “Firm”), and third-party defendant Benedict Morelli (“Morelli”) to strike the amended answer and for sanctions is granted in part, and the cross-motion by defendant/third-party plaintiff Mark Perez (“Perez”) for leave to file a second amended answer is denied, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 55-56, 84), and the exhibits attached thereto, in which the court concurs, as summarized herein. The court assumes familiarity with the facts and prior history of this matter as set forth in its prior decisions (NYSCEF Doc Nos. 26, 49).

By decision and order dated February 8, 2024, the Appellate Division, First Department, modified this court's decision on the motion by the Firm and Morelli to dismiss Perez' counterclaims to the extent of dismissing the counterclaim for breach of fiduciary duty (*Morelli Law Firm, PLLC v Perez*, 224 AD3d 457, 458 [1st Dept 2024]). The Appellate Division also held as follows with regard to Perez's allegations: "Defendant does allege that his attorney failed 'to communicate multiple settlement offers' to him. Defendant contends that this allegation includes prior offers that may ultimately have netted him more. In light of this allegation, and defendant's representation, the claim is dismissed with leave to replead such additional concealed offers" (*id.*).

Perez filed an amended answer and counterclaims on March 1, 2024 (NYSCEF Doc. No. 53). Notably, the amended answer does not include additional allegations of "prior offers that may ultimately have netted [Perez] more," except to state that Morelli had informed him of offers for \$47.5 million and \$51 million that he rejected without discussion, both of which were less than the final settlement amount of \$55 million (*id.*, ¶¶ 170). Perez further stated, upon information and belief, that Morelli had "rejected without first conveying to Mr. Perez at least one settlement offer that was made during the course of the underlying action prior to the appeal" (*id.*, ¶ 171), but did not allege that said offer was higher than the ultimate settlement amount. Moreover, Perez no longer alleged a counterclaim for breach of fiduciary duty, instead, seeking a declaratory judgment deeming the Firm and Morelli to have been terminated for cause for violating various provisions of the Rules of Professional Conduct and requiring the Firm and Morelli to disgorge the entirety of their fee for the underlying action (*id.*, ¶¶ 196-202).

The Firm and Morelli made the instant motion to strike the amended answer as procedurally improper and beyond the limited leave granted by the Appellate Division, as

palpably insufficient or patently devoid of merit, and for sanctions in the form of their attorneys' fees and costs on the motion. Perez cross-moves to withdraw the amended answer and for leave to file a second amended answer. Of note, the proposed second amended answer no longer seeks to retroactively terminate the Firm and Morelli for cause, but instead, seeks disgorgement based on the failure to file retainer and closing statements (second proposed counterclaim) and the failure to follow the Rules of Professional Conduct.

CPLR 3025 provides that a party may amend a pleading once as of right (CPLR 3025 [a]), but afterwards must obtain either a stipulation of all parties or leave of the court. Perez, in his papers in opposition to the motion and support of the cross-motion, effectively concedes that the amended answer and counterclaims go beyond the scope of the limited leave granted by the Appellate Division (Perez memorandum of law, NYSCEF Doc. No. 71 at 4). Indeed, the amended answer includes none of the specific additional allegations contemplated by the Appellate Division, and instead, asserts an entirely different theory of liability. As such, leave of court was necessary, and Perez' failure to obtain leave renders the amended answer a procedural nullity (*e.g. ALP, Inc. v Moskowitz*, 206 AD3d 488, 489 [1st Dept 2022] ["Because this procedure was not followed, the amended complaint must be dismissed"]). Perez' arguments to the contrary are unavailing.

Turning to the cross-motion for leave to amend, "[l]eave shall be freely given upon such terms as may be just" (CPLR 3025[b]). Absent undue delay, prejudice, or surprise, and provided the proposed amendment arises from the same transactions and occurrences as the original complaint, the motion should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or

clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [internal quotation marks and citations omitted]). “A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citation omitted]). A court must, however, examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept 2007]). Leave should not be granted where the proposed new pleading is “palpably insufficient or patently devoid of merit” (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2d Dept 2015]).

Here, Perez does not satisfy his burden on the cross-motion. The proposed new counterclaims seek fee disgorgement because of the Firm and Morelli’s failure to comply with a Second Department rule regarding the failure to file retainer and closing statements and with various provisions of the Rules of Professional Conduct. As a general matter, fee disgorgement is only appropriate where an attorney is terminated for cause (*Kasmin v Josepchs*, 228 AD3d 431, 432 [1st Dept 2024] [Denying claim for disgorgement where “the client did not seek termination for cause until after defendant had already completed her services and had obtained a favorable settlement for plaintiff”]). Perez expressly denies that he is seeking to have the Firm and Morelli retroactively terminated for cause (Perez memorandum of law, NYSCEF Doc. No. 71 at 14 n 4). In addition, a violation of the Rules of Professional Conduct does not give rise to a private cause of action (*Jacobson v Seddio*, 225 AD3d 448, 449 [1st Dept 2024]). Section 603.25 of the Uniform Rules for Trial Courts (22 NYCRR) – the First Department equivalent of the Second Department rule cited by Perez – also does not provide for a cause of action against the Firm and Morelli. The regulation requires that attorneys engaged in a personal injury matter must file a retainer statement at the beginning of the case and a closing statement at its conclusion regarding

the representation. Here, the Firm filed its retainer statement for the underlying action late (retainer statement, NYSCEF Doc. No. 83), but prior to Perez's cross-motion. The late filing of a retainer statement preserves the Firm's "right to recover legal fees otherwise earned" (*Garrett v New York City Health & Hosps. Corp.*, 25 AD3d 424, 425 [1st Dept 2006]). Moreover, Perez does not dispute that he retained the Firm and that the Firm represented him throughout the course of the underlying litigation (*Fuentes v Brookhaven Mem. Hosp.*, 43 AD3d 992, 994 [2d Dept 2007]).

For the reasons set forth above, the proposed amended answer is "palpably insufficient and patently devoid of merit," and the court denies the cross-motion for leave to amend. However, the court exercises its discretion to deny the award of sanctions pursuant to section 130-1.1 of the Uniform Rules for Trial Courts (22 NYCRR) sought by the Firm and Morelli (*e.g. FX Funding LLC v Fox RX Inc.*, 201 AD3d 519, 519 [1st Dept 2022]). The Uniform Rules provide that the courts may sanction parties and counsel who engage in frivolous conduct, defined as "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law . . . undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or . . . it asserts material factual statements that are false (Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [c]). Here, through the Firm and Morelli assert that Perez has asserted materially false statements of fact, the fact that they are disputing Perez' factual presentation with other evidence does not automatically render Perez' facts false to the point of being frivolous. Moreover, the record does not support the claim that Perez' conduct was undertaken to delay this case, or to harass the Firm and Morelli. While Perez would have been better served by litigating in the

manner required by the CPLR, as described above, the court finds the litigation choices made by his counsel to be misguided rather than malicious.<sup>1</sup>

Accordingly, it is hereby

ORDERED that the motion by plaintiff Morelli Law Firm, PLLC, and third-party defendant Benedict Morelli to strike the amended answer and counterclaims and for sanctions is granted to the extent that the amended answer is hereby stricken, and otherwise denied; and it is further

ORDERED that the cross-motion by defendant/third-party plaintiff Mark Perez for leave to file a second amended answer is denied.

This constitutes the decision and order of the court.

ENTER:



<u>10/16/2024</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

<sup>1</sup> Having said that, the court expects Perez to henceforth litigate in accordance with the requirements of the CPLR.