

**SUPREME COURT OF THE STATE OF NEW YORK**  
*Appellate Division, Fourth Judicial Department*

1481

CA 09-00357

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, GREEN, AND GORSKI, JJ.

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KESSEL BRENT CORPORATION AND CHRISTOPHER C.  
VESCERA, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

BENDERSON PROPERTY DEVELOPMENT, INC.,  
DEFENDANT-RESPONDENT.

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RICHARD E. KAPLAN, UTICA, FOR PLAINTIFFS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (John W. Grow, J.), entered November 20, 2008 in a breach of contract action. The order and judgment awarded defendant attorneys' fees and costs incurred in the defense of plaintiffs' prior appeals in this action.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed with costs.

Memorandum: Supreme Court properly granted defendant's motion seeking an award of attorneys' fees and costs incurred in the defense of plaintiffs' prior appeals in this action for breach of the parties' purchase and sale agreement (agreement). The agreement provided that, in an action to interpret or enforce its terms, "the prevailing party shall be entitled to be awarded its reasonable attorneys' fees through all appeals in addition to other costs and disbursements allowed by law, including those incurred on appeal." Defendant was the prevailing party in the prior appeals and is thus entitled to recover its attorneys' fees and costs incurred in the defense thereof (see *John T. Nothnagle, Inc. v Chiarello*, 66 AD3d 1524). We reject plaintiffs' contention that defendant should have moved for such relief in this Court or in the Court of Appeals (see *DiFilippo v DiFilippo*, 286 AD2d 869). Plaintiffs' further contention that defendant was required to amend its answer in order to seek the instant relief is raised for the first time on this appeal and thus is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court