

<b>Tsao v Goldberg, Scudieri, &amp; Block, P.C.</b>
2007 NY Slip Op 33202(U)
October 2, 2007
Supreme Court, New York County
Docket Number: 0108095/2007
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**CAROL EDMEAD**

PRESENT: \_\_\_\_\_ **J.S.C.** \_\_\_\_\_

PART 35

Index Number : 108095/2007

TSAO, WENDEL

INDEX NO. \_\_\_\_\_

vs

GOLDBERG, SCHDIERI, & BLOCK,

MOTION DATE 9/20/07

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

DISMISS COMPLAINT

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

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

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED

**FILED**

OCT 09 2007

NEW YORK  
COUNTY CLERK'S OFFICE

In this action for legal malpractice, defendants Goldberg, Scudieri, & Block, P.C., Alan Goldberg, and David Scudieri ("defendants") move to dismiss the Complaint of plaintiff Wendell Tsao ("plaintiff") pursuant to CPLR 3211(a)(1), (5) and (7) with prejudice based upon (a) the doctrines of *res judicata* and collateral estoppel, (b) for failure to state a cause of action, (c) statute of limitations, and (d) documentary evidence.

In support, defendants submit, *inter alia*, a decision dated March 28, 2007 issued by the Civil Court in an action previously commenced by plaintiff against the instant defendants for legal malpractice stemming from defendants' representation of plaintiff in a summary holdover proceeding.

Plaintiff opposes the motion, arguing that this action is permitted under CPLR 205, which allows for recommencement of an action dismissed under CPLR 3211(a)(7), and that this action is not subject to *res judicata* or collateral estoppel effect, since the previous legal malpractice action was dismissed simply on the ground of failure to state a cause of action. Plaintiff also argues that this action is timely since it was recommenced pursuant to CPLR 205, and that the Complaint herein states a viable cause of action. Further, the facts pleaded in the Complaint are supported by documentary evidence proffered by defendants.

Dated: \_\_\_\_\_

J.S.C.

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 REFERENCE

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

In reply, defendants point out, *inter alia*, that the underlying decision was decided pursuant to CPLR 3211(a)(7) (dismissal based on documentary evidence) and that the Civil Court dismissed the action on the merits. Defendants also argue that the Complaint lacks merit, the documentary evidence supports dismissal of the action, and plaintiff's Complaint fails to sufficiently allege the essential element of causation.

### Analysis

*Res judicata*, or claim preclusion, is invoked when parties seek to relitigate entire causes of action between them and applies to matters which were actually litigated or could have been litigated in the earlier action (*DaimlerChrysler Corp. v Spitzer* --- NYS2d ----, 2004 N.Y. Slip Op. 24357; see *Hyman v Hillelson*, 79 AD2d 725, 726, affd 55 NY2d 624). Pursuant to the doctrine of *res judicata*, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357; see also, *Smith v Russell Sage Coll.*, 54 NY2d 185; *Matter of Reilly v Reid*, 45 NY2d 24; *Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 558; Restatement [Second] of Judgments § 24). In order for the doctrine of *res judicata* to apply, the party to be precluded in the current action must have been a party to the prior action where the claim at issue was litigated or could have been litigated.

The courts have previously approved the pragmatic approach in determining what constitutes a single transaction or series of transactions for the purposes of applying the doctrine of *res judicata*. In *Braunstein v Braunstein* (114 AD2d 46, 53), the court stated: "Res judicata serves to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same 'factual grouping' or 'transaction', and which should have or could have been resolved in the prior proceeding. In order for *res judicata* to apply, however, the foundational facts must be related in 'time, space, origin, or motivation [as well as] form a convenient trial unit' and it must be established that the 'treatment [of the foundational facts] as a unit conforms to the parties' expectations" (*Smith v Russell Sage Coll.*, 54 NY2d at 192-193, *supra*, quoting from Restatement [Second] of Judgments [Tent. Draft No. 1] § 61)."

Collateral estoppel, or issue preclusion, is invoked when the cause of action in the second proceeding is different from that in the first and applies to a prior determination of an issue which was actually and necessarily decided in the earlier case (*DaimlerChrysler Corp. v Spitzer*, *supra*). It is confined to the point actually determined and applies only to issues which were actually litigated, not to those which could have been litigated (*id.*). In order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: the party seeking the benefit of the doctrine must prove that the identical issue was decided in the prior action and is decisive in the current action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*DaimlerChrysler Corp. v Spitzer*). The doctrine of collateral estoppel precludes a party from relitigating an issue which has been previously, actually and necessarily decided against him or her in a prior proceeding in which there was a full and fair opportunity to litigate the point (*Kaufman v Eli Lilly & Co.*, 65 N.Y.2d 449, 455).

“[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue” (*Ryan, supra* 62 NY2d at 501; *Capital Telephone Co., Inc. v Pattersonville Telephone Co., Inc.*, 56 NY2d 11, 18; *Schwartz v Public Admin.*, 24 NY2d 65, 73). The opponent, on the other hand, has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the administrative hearing (*Ryan, supra* 62 NY2d at 501; *Capital Telephone, supra* 56 N.Y.2d at 18).

The Court notes that in the previous action, the motion to dismiss by defendants was made pursuant to CPLR 3211 (a)(1) and (7). It is clear from the record that the Civil Court did not base its dismissal on the “four corners” of the Complaint, but also, on the documentary evidence before it, including plaintiffs’ open-court stipulation with his then landlord, the plaintiff’s motion to later set aside that stipulation, the Housing Court’s denial of plaintiff’s motion, a subsequent stipulation between plaintiff and his landlord, the absence of any expert affidavit to support plaintiff’s legal malpractice action, and determined the lack of merit of plaintiff’s claims of malpractice.

The submissions indicate that the instant action against defendants for legal malpractice in connection with their representation of plaintiff during a summary holdover proceeding raises issues of fact and law which were necessarily decided by the Civil Court. As the previous Complaint alleged, it is alleged herein that defendants were retained to represent plaintiff in the underlying summary holdover proceeding, and that defendants failed to render competent legal services in connection with that proceeding. Further, plaintiff and defendants were parties to the prior action where the claims at issue herein were litigated. The transactions upon which this action is based were the subject of prior claims brought by and concluded against plaintiff. Claims can arise out of the same transaction or series of transactions “even if there are variations in the facts alleged, or different relief is sought” and even when “several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief” (*Elias v Rothschild*, 29 A.D.3d 448, 815 N.Y.S.2d 89 [1<sup>st</sup> Dept 2006]). Further, although a prior judgment “does not specifically recite that it is ‘on the merits,’ that judgment should be given *res judicata* effect in order to prevent the plaintiff from circumventing the preclusion decree” (*Feigen v Advance Capital Management Corp.*, 146 A.D.2d 556, 536 N.Y.S.2d 786 [1<sup>st</sup> Dept 1989] citing *Barrett v Kasco Constr. Co., Inc.*, 56 N.Y.2d 830, 831, 452 N.Y.S.2d 566, 438 N.E.2d 99). And, CPLR 5013 does not require that the prior judgment contain the precise words ‘on the merits’ in order to be given *res judicata* effect; it suffices that it appears from the judgment that the dismissal was on the merits” (*Feigen v Advance Capital Management Corp.*, 146 A.D.2d 556, *supra*, citing *Strange v Montefiore Hospital and Medical Center*, 59 N.Y.2d 737, 739, 463 N.Y.S.2d 429, 450 N.E.2d 235). Therefore, since the Civil Court concluded that plaintiff could not assert legal malpractice claims against the defendants arising out of the facts and transactions set forth in the original complaint, plaintiff is now precluded by *res judicata* from repleading against the dismissed parties (*see e.g., Feigen v Advance Capital Management Corp.*, 146 A.D.2d 556, *supra*). Moreover, the Civil Court decision is currently pending on appeal.

Further, the identical issues concerning the defendants' representation of plaintiff regarding the stipulation of settlement were decided in the prior action and plaintiff had a full and fair opportunity to contest the issues raised in the prior action for legal malpractice. Therefore, this instant action is barred by the doctrine of collateral estoppel.

Based on the foregoing, it is hereby


ORDERED that the motion by defendants to dismiss the Complaint is granted on the grounds of *res judicata* and collateral estoppel; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

**FILED**  
OCT 09 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated 10/2/07

ENTER:  J.S.C.  
**CAROL EDMEAD**  
J.S.C.

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