

**Kinberg v Schwartzapfel, Novick, Truhowsky,  
Marcus, P.C.**

2014 NY Slip Op 33710(U)

October 3, 2014

Supreme Court, Bronx County

Docket Number: 304804/10

Judge: Norma Ruiz

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This opinion is uncorrected and not selected for official publication.

PART 22

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

KINBERG, SIVAN

-against-

SCHWARTZAPFEL, TRUHOWSKY

Index No. 0304804/2010

Hon. NORMA RUIZ

**NORMA RUIZ**

Justice.

- Case Disposed
- Settle Order
- Schedule Appearance

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, DISMISSAL  
 Noticed on October 03 2013 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

**MOTION IS DECIDED IN ACCORDANCE WITH  
 THE ACCOMPANYING MEMORANDUM DECISION.**

Motion is Respectfully Referred to:

Justice: \_\_\_\_\_

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

Dated: 10, 3, 13

Hon. **NORMA RUIZ**

**NORMA RUIZ, J.S.C.**  
**NORMA RUIZ**

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index No. 304804/10

\_\_\_\_\_  
SIVAN KINBERG

Plaintiff,

-against-

Decision and Order  
HON. NORMA RUIZ

**NORMA RUIZ**

SCHWARTZAPFEL, NOVICK, TRUHOWSKY,  
MARCUS, P.C.; a.k.a. SCHWARTZAPFEL,  
TRUHOWSKY, MARCUS SACHS, P.C., a.k.a.  
SCHWARTZAPFEL, TRUSHOWSKY,  
MARCUS, P.C.

Defendant.  
\_\_\_\_\_

The following papers numbered to Read on this motion DISMISSAL  
Noticed on \_\_\_\_\_ and duly submitted as No. 9 on the Motion Calendar of 2/3/14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
	Notice of Motions and Affidavits Annexed.....	1-2
	Notice of Cross Motions and Answering Affidavits.....	3-5
	Replying Affidavits .....	6
	Memorandum of Law .....	
	Other:	

*Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:*

Defendant moves to dismiss pursuant to CPLR sections 3211(a)(5), 3211(a)(7) and 3212. Plaintiff cross moves for partial summary judgment on the issue of liability or in the alternative for an order striking the defendants' answer based on their failure to comply with discovery demands. Upon a review of the moving papers and opposition submitted thereto the defendants' motion is granted and the plaintiff's cross motion is denied.

This is a legal malpractice action. The defendants represented the plaintiff Sivan Kinberg (“Kinberg”) in the personal injury action venued in Bronx County, Civil Court captioned *Sivan Kinberg v. Kate Shnay* with the Index No.: 2352/2003). In the underlying action, it was alleged that Kinberg was hit in the face with a soccer ball in 1997 by one of her classmates while she was a student at the Horace Mann School in the Bronx. The personal injury action was dismissed by the court order of the Honorable Lizbeth Gonzalez dated June 20, 2007. Plaintiff contends that the defendant committed legal malpractice because the action was dismissed due to the law firm’s failure to comply with a discovery order and it’s failure to oppose the motion to dismiss that was based on the law firm’s default.

Kinberg, acting pro se, moved to vacate the June 20, 2007 order and to restore the action to the court’s calendar. Judge Gonzalez denied the motion on February 7, 2008, on the grounds that the plaintiff did not establish merit to her action since the medical records Kinberg annexed to the motion were not in admissible form (they were uncertified) and were not contemporaneous with the accident. The medical records were for treatment received in 2003, 2004 and 2005 more than six years after the accident. In addition, the court found that medical records no valid excuse for the failure to comply with the court order discovery was proffered.

Kinberg, acting pro se, appealed both of Judge Gonzalez’ orders to the Appellate Term, First Department and both orders were affirmed. The Appellate Term held that the lower court properly granted the motions based upon “the absence of the requisite showing by plaintiff of a reasonable excuse for her discovery derelictions and merit to her 2003 negligence claim” (*Kinberg v. Shnay*, 25 Misc3d 138[A] [N.Y. Sup. App. Term 2009]).

Defendant, the law firm of Schwartzapfel Parnters P.C., incorrectly sued as SCHWARTZAPFEL, NOVICK, TRUHOWSKY, MARCUS, P.C.; a.k.a. SCHWARTZAPFEL, TRUHOWSKY, MARCUS SACHS, P.C., a.k.a. SCHWARTZAPFEL, TRUSHOWSKY, MARCUS, P.C. (“law firm”) moves to dismiss on the grounds the plaintiff can not establish a cause of action for legal malpractice since it has already been determined that her underlying personal injury action lacked merit. In addition, it contends that plaintiff made the representation during her appeal to the Appellate Term that the law firm opposed the subject motion that resulted in the dismissal of the action. Thus, she can not now allege that the law firm committed legal malpractice when it failed to oppose the motion which caused the underlying personal injury action to be dismissed.

That branch of the motion made pursuant to CPLR section 3212 is denied. Movant failed to submit an affidavit from a person with knowledge of the facts as required by CPLR 3212 (b).

That branch of the motion made pursuant to CPLR section 3211(a)(7) is denied. A motion to dismiss under CPLR section 3211(a)(7), for failure to state a cause of action must be denied if the factual allegations contained within the pleadings four corners manifest any cause of action cognizable at law (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002]). Upon a review of the complaint, the court finds that the complaint sets forth a cause of action for legal malpractice.

The court does grant that branch of the motion made pursuant to CPLR section 3211(a)(5) based on the doctrine of collateral estoppel. Defendant contends that based on the Civil Court order of Judge Gonzalez and the decision of the Appellate Term, which held that the plaintiff failed to establish, the plaintiff is now collaterally estopped from now litigating the merit of her underlying personal injury action which is a necessary element to the legal malpractice action at bar.

The doctrine of collateral estoppel precludes a party from relitigating “an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point (*Kaufman v. Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]). There are two requirements that have to be satisfied before the doctrine is invoked. First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*id.*). The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (*id. see also Juan C. v. Cortines*, 89 NY2d 659 [1997]).

“To recover damages for legal malpractice, a plaintiff must demonstrate that the attorney defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages” (*Pannone v. Silberstein*, 118 AD3d 413 [1st Dept 2014] citing *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442, 835 N.Y.S.2d 534, 867 N.E.2d 385 [2007] ). “To establish causation, a plaintiff must show that

he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" ( id.). Thus, the plaintiff in the legal malpractice action must establish that her underlying personal injury action had merit.

In moving to vacate Judge Gonzalez' order one of the things the plaintiff had to establish was that she had a meritorious cause of action. Based on the fact that all the medical records the plaintiff submitted were for treatment received six years after the complained of incident the court found that she failed to establish a meritorious cause of action. Plaintiff appealed this order and the order was affirmed. Thus, the issue of whether or not the plaintiff had a meritorious cause of action was fully litigated when the plaintiff moved to vacate Judge Gonzalez' order. Since, a meritorious cause of action is one of the essential elements to sustain a cause of action for legal malpractice, this issue is decisive in the case at bar. As such, the court finds the defendant met its burden in establishing that the plaintiff is collaterally estopped from re-litigating this issue.

The court has reviewed the plaintiff's opposition (which in essence contends the defendant misinterpreted the relevant court orders) and finds that it failed to establish the absence of a full and fair opportunity to litigate the issue in the prior action (*Pannone, supra*).

Accordingly, the defendant's motion to dismiss is granted. This action is hereby dismissed. The plaintiff's cross motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: 10/3/14  
Bronx, New York

  
HON. NORMA RUIZ, J.S.C.  
**NORMA RUIZ**