STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE UNILAND PARTNERSHIP OF
DELAWARE, L.P., as Successor by Merger to
UNILAND DEVELOPMENT COMPANY

Plaintiff

vs.

MEMORANDUM
DECISION

Index No. 4961/06

BLUE CROSS OF WESTERN NEW YORK, INC.
and HEALTH NOW, INC.

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Harris Beach PLLC**
Attorneys for Plaintiff
Richard T. Sullivan, Esq., of Counsel

Jaeckle, Fleischmann & Mugel, LLP
Attorneys for Defendants
Mitchell J. Banas, Jr., Esq., of Counsel

CURRAN, J.

Defendants move to dismiss this breach of contract action pursuant to CPLR 3211 (a) (1) and (a) (5) on the grounds that plaintiff's cause of action is precluded by the doctrines of *res judicata* and collateral estoppel. Specifically, defendants allege that, because a previous action between the same two parties and this action arise from the same set of facts, the judgment in the previous action precludes the relief sought in this action.

Plaintiff counters that the previous action was dismissed for failure to state a cause of action and that, as a matter of law, such a dismissal is not on the merits, thereby removing this action from the preclusive effects of the *res judicata* and collateral estoppel doctrines. Plaintiff also asserts that the complaint in this action raises different factual and legal issues than were raised in the previous action.

The previous action alleged in one cause of action the breach of a Letter Agreement between the parties. The complaint in the previous action broadly alleged that: "Blue Cross and/or Health Now are in breach of their obligation under paragraph "5" of the Letter Agreement." (Banas Aff., Ex. 2, ¶ 13). In pertinent part, paragraph "5" of the Letter Agreement provides that plaintiff shall have the "exclusive right and option to develop or acquire building facilities" for the defendants should the defendant elect to build a new facility elsewhere. (Banas Aff., Ex. 1, Ex. C). Following Justice Fahey's denial of defendants' motion to dismiss, the Fourth Department reversed, granted the motion and dismissed the complaint. (Banas Aff., Exs. 5 & 7). In its memorandum decision, the Fourth Department referred to the previously-quoted language of paragraph "5." The Fourth Department concluded that paragraph "5" of the Letter Agreement was an unenforceable agreement to agree because it was indefinite and impossible to enforce. (Banas Aff., Ex. 7). The Fourth Department subsequently denied a motion for reargument and for leave to appeal to the Court of Appeals. (Banas Aff., Ex. 10). The Court of Appeals also denied a motion for leave to appeal. (Banas Aff., Ex. 12). A Judgment was ultimately entered dismissing the complaint. (Banas Aff., Ex. 8).

Plaintiff asserts that the Judgment in the previous action should not be afforded preclusive effect here because the dismissal in the previous action was one for failure to state a

cause of action and that such a dismissal is not, as a matter of law, on the merits. This is an incorrect statement of the law. It is well settled that a court's decision need not contain the words "on the merits" in order for the judgment based on that decision to be given preclusive effect (*Strange v Montefiore Hosp. & Med. Center*, 59 NY2d 737 [1983]). Rather, the courts employ a transactional analysis to determine whether the previous action brought the claims to a final conclusion (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Smith v Russell Sage College*, 54 NY2d 185 [1981]). If so, the judgment is preclusive for all other claims arising out of the same transaction or series of transactions which might have been litigated, even if based on different theories or seeking a different remedy (*O'Brien*, 54 NY2d at 357). The courts have applied this rule to judgments premised on motions to dismiss for failure to state a cause of action (*see Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556 [1st Dept 1989]; *Lampert v Ambassador Factors Corp.*, 266 AD2d 124 [1st Dept 1999]).

This Court's understanding of the Fourth Department's memorandum decision is that the Fourth Department brought the matter to a final conclusion. Moreover, there is no doubt that the facts underlying this action are the same as those which gave rise to the previous action. This Court's reading of the Fourth Department's memorandum decision is further substantiated by the fact that the Fourth Department denied reargument on virtually the same arguments advanced by plaintiff here.

Plaintiff asserts that there is a finer point in this action because plaintiff is seeking to recover damages based on the breach of the option right in paragraph "5" of the Letter Agreement as opposed to the breach of the right to develop or other rights contained in that paragraph. This is a distinction without a difference because plaintiff's allegation of a

breach of the option right, even assuming that right is somehow separate and apart from the other rights in paragraph "5," would only afford plaintiff the potential to proceed with an agreement which the Fourth Department held is too indefinite to be enforced. The end result would be the same. Moreover, the language of the complaint in the first action is so broad that it cannot avoid being construed as alleging a breach of every right to which plaintiff may have been entitled under paragraph "5." The overlap between the two actions cannot be disputed.

For all of these reasons, defendants' motion to dismiss is granted in all respects.

DATED: June 15, 2007

HON. JOHN M. CURRAN, J.S.C.