

<b>MHR Capital Partners LP v Presstek, Inc.</b>
2007 NY Slip Op 32322(U)
July 19, 2007
Supreme Court, New York County
Docket Number: 0600490/2005
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_

HON. RICHARD B. LOWE, III

PART 58

Index Number : 600490/2005

MHR CAPITAL PARTNERS LP

vs

PRESSTEX INC

Sequence Number : 008

SUMMARY JUDGMENT

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

MOTION DATE 6/7/07

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

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

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

PAPERS NUMBERED

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUL 26 2007

NEW YORK COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III

Dated: 7/19/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----X  
MHR CAPITAL PARTNERS LP, MHR  
INSTITUTIONAL PARTNERS LP, MHRM LP,  
Delaware limited partnerships, and MHR FUND  
MANAGEMENT LLC, a Delaware limited  
liability corporation,

Plaintiffs,

Index No. 600490/05

-against-

PRESSTEK, INC. and SILVER ACQUISITIONS  
CORP., Delaware corporations,  
Defendants.

**FILED**  
JUL 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**Hon. Richard B. Lowe, III:**

Defendant Presstek, Inc. (Presstek) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor, dismissing the complaint, dated February 8, 2005 (Complaint) of plaintiffs MHR Capital Partners LP, MHR Institutional Partners LP, MHRM LP, and MHR Fund Management LLC (collectively, the MHR entities) on the grounds that the claims asserted by the MHR entities are barred by the doctrines of law of the case, collateral estoppel and/or res judicata, or, alternatively, on the merits, that the claims are without basis, as a matter of fact and law.

**BACKGROUND**

MHR Fund Management LLC (MHR Fund) manages the other MHR entities, which are investment limited partnerships. MHR Fund is a limited-liability corporation organized under Delaware law, with its place of business in New York. This action concerns the purchase of the assets or stock of A.B. Dick Company (ABD), a supplier of goods and services to

the graphic arts and imaging industries, from ABD's parent, Paragon Corporate Holdings, Inc. (Paragon). ABD eventually filed for bankruptcy, and MHR Fund became its largest creditor.

Presstek is a Delaware corporation with its principal place of business in New Hampshire. It is a goods and services supplier for the graphic arts and imaging industries. Defendant Silver Acquisitions Corp. (Silver), a Delaware corporation, is also involved in the graphic arts and imaging industries.<sup>1</sup>

In 2004, defendants considered purchasing ABD and proposed a stock purchase agreement. Under the Stock Purchase Agreement, one or more of the MHR entities would receive fees and other reimbursements. The defendants did not sign the Stock Purchase Agreement because they were allegedly waiting for certain condition precedents to occur; they instead negotiated an Escrow Agreement in June 2004, whereby the Stock Purchase Agreement was escrowed for a period of time. The Escrow Agreement specified certain conditions for the release of the Stock Purchase Agreement, including the requirement that ABD's bank, the Key Bank, sign a consent to the transaction in the form annexed to the Escrow Agreement. In this regard, the Escrow Agreement stated that "the parties hereto have agreed that the escrow provided for hereunder shall in no event be released unless and until Key [Bank] consents to the transaction on the terms and conditions contained herein." Key Bank did not sign the Consent Form by the agreed-upon deadline. Defendants therefore took the position that, in accordance with the terms of the Escrow Agreement, the Stock Purchase Agreement was terminated, and

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<sup>1</sup> Following a hearing, on July 14, 2006, Special Referee Lancelot B. Hewitt found that the evidence was sufficient to support the court's acquisition of personal jurisdiction with respect to Presstek, but was insufficient with respect to Silver. By Order, dated January 3, 2007 (filed January 17, 2007), the court confirmed the Special Referee's report, and dismissed the Complaint as against Silver.

notified all participants in the negotiations, including Key Bank, that all documents associated with the planned sale of ABD were considered null and void. The MHR entities take the position that defendants' declaration that the Stock Purchase Agreement and the Escrow Agreement were terminated was done in bad faith and was a pretext for their plan to purchase ABD on terms more favorable to defendants (and unfavorable to the MHR entities) than that provided for in the Stock Purchase Agreement.

ABD filed for bankruptcy on July 13, 2004 in the United States Bankruptcy Court for the District of Delaware (Bankruptcy Court). ABD and Paragon, as debtors and debtors-in-possession, applied to the Bankruptcy Court for an order authorizing the sale of substantially all of ABD's assets to Silver, pursuant to a so-called "stalking horse auction" wherein third parties are invited to top Silver's purchase proposal. On August 9, 2004, the MHR entities opposed the auction sale of ABD's assets, which was designed, supervised and implemented by the Bankruptcy Court, on the ground, among other things, that Silver was not a "good faith purchaser" within the meaning of 11 USC § 363 (m). On November 3, 2004, following document production, depositions, written submissions, an evidentiary hearing and oral argument, the Bankruptcy Court issued an order overruling the MHR entities' objections, and finding that "Silver is a good faith purchaser under section 363 (m) of the Bankruptcy Code." The sale of ABD's assets to Silver in the Bankruptcy Court-controlled proceeding was thereafter consummated.

The MHR entities appealed the November 3, 2004 order of the Bankruptcy Court to the United States District Court for the District of Delaware (District Court). On May 25, 2005, following a hearing on the appeal, the District Court entered an order dismissing the appeal

as moot because the MHR entities had not sought a stay of the sale pending the appeal.

### DISCUSSION

Presstek maintains that both the doctrine of collateral estoppel and res judicata preclude the MHR entities from reasserting those previously litigated and determined claims in this action. The MHR entities dispute the application of these doctrines to the facts of this case.

Presstek contends that the issues raised in the Complaint were already litigated and determined adversely to the MHR entities in the Bankruptcy Court and in the District Court. Specifically, Presstek maintains that the objections and contentions asserted by the MHR entities in the Bankruptcy Court and on appeal to the District Court are almost identical to the claims asserted by the MHR entities in the Complaint herein. Presstek additionally points out that the allegations asserted by the MHR entities in paragraphs nine through 25 of the Complaint virtually mirror their allegations in paragraphs seven through 20 of their supplemental objections in the Bankruptcy Court, wherein they charged Presstek with breach of the Escrow Agreement and Stock Purchase Agreement, as they likewise assert here in this action.

“The doctrine, or principle, of res judicata is that ‘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 relief’ (Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp., 93 NY2d 375, 380 [1990] citation omitted; see also Luscher ex rel. Luscher v Arruz, 21 AD3d 1005 [2d Dept 2005]; Santiago v New York Bd. of Health, 8 AD3d 179 [1st Dept 2004]; Sound Distrib. Corp. v Ponce Acquisition Corp., 179 AD2d 469 [1st Dept 1992]). ‘The party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in the instant action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue’ (Luscher ex rel. Luscher v Arruz, 21 AD3d 1005, at 1007, supra). Res judicata is an affirmative defense with the following three elements ‘(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them [and]; (3) the claims asserted in the subsequent action were, or could have been, raised in

the prior action.’ (Monahan v City of New York Dept. of Corr., 214 F3d 275, 285 [2d Cir 2000] citations omitted, cert den 531 US 1035 [2000]). ‘The second lawsuit must, however, also involve the same “claim-or nucleus of operative fact”-as the first suit.’ (Fulani v MacKay, Slip Copy, 2007 WL 959308 [SD NY 2007] citation omitted). A claim is identical if it involves the same primary right (see City of Martinez v Texaco Trading & Transp., Inc., 353 F3d 758 [9th Cir 2003]; cf Glatt v Town of Williamstown, 11 AD3d 1017 [4th Dept 2004]).”

(Rosen v Kessler, 5 Misc3d 1139 (A) (Sup Ct, Suffolk County, April 24, 2007, Whelan, J.)

Under New York’s transactional approach to 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” (Ebanks v 547 West 147<sup>th</sup> Street Housing Development Fund Corp., 37 AD3d 290, 291 [1<sup>st</sup> Dept 2007], quoting O’Brien v City of Syracuse, 54 NY2d 353, 357 [1981]). Thus, once a claim is finally adjudicated, all other claims emanating from the same set of events are precluded, even if they are premised on a new legal theory (see Sosa v JP Morgan Chase Bank, 33 AD3d 609, 611 [2d Dept 2006]; Fifty CPW Tenants Corp. v Epstein, 16 AD3d 292 [1<sup>st</sup> Dept 2005]; see also Baldo v Marine Midland Bank, N.A., 219 AD2d 807 [4<sup>th</sup> Dept 1995]).

Presstek submits that the claims asserted by the MHR entities here arose out of the same transactions as the objections they asserted in the Bankruptcy Court. Applying the transactional analysis here, Presstek thus maintains that the findings contained in the Bankruptcy Court order, dated November 3, 2004, preclude the MHR entities’ purported claims in this action as a matter of law. This court agrees.

Presstek has demonstrated that the MHR entities had a full and fair opportunity to litigate the claims in question, and the MHR entities have not rebutted this showing. The MHR entities raised defendants’ alleged bad faith as objections in the Bankruptcy Court and those

objections were overruled. They asserted the same claims on their appeal to the District Court and the appeal was dismissed.

The court rejects the MHR entities' argument that res judicata or collateral estoppel are inapplicable here because none of the MHR entities was a party to ABD's bankruptcy proceeding. While the MHR entities were not officially named as parties in the Bankruptcy Court proceedings, they filed objections and otherwise fully participated in all matters before the Bankruptcy Court relative to their claims. These claims were fully and fairly litigated, and resolved unfavorably to the MHR entities. Accordingly, the court holds that the claims asserted by the MHR entities in the Complaint are precluded by the doctrine of res judicata.<sup>2</sup>

Application of the doctrine of collateral estoppel yields the same result. As explained in Loving v Abbruzzese (298 AD2d 749, 750-751 [3d Dept 2002]):

“Application of the doctrine of collateral estoppel requires “that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue” (Adam v Cutner & Rathkopf, 238 AD2d 234, 242 [1<sup>st</sup> Dept 1997], quoting Allied Chem. v Niagara Mohawk Power Corp., 72 NY2d 271, 276 [1988], cert denied 488 US 1005 [1989]).”

Thus, in Loving, since certain claims asserted by plaintiffs in the state court action had already been asserted and fully and fairly litigated before the Bankruptcy Court, they were

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<sup>2</sup> Furthermore, it is generally improper for a party to bring a second plenary action seeking to collaterally attack the judgment in an original action (see North Shore Environmental Solutions, Inc. v Glass, 17 AD3d 427 [2d Dept 2005]). There is a limited exception to this rule based on fraud in the underlying proceeding (see Newin Corp. v Hartford Accident and Indemnity Co., 37 NY2d 211 [1975]); however, the MHR entities' conclusory and unsubstantiated allegations are insufficient to bring this case within the exception to the rule.

precluded by collateral estoppel (see also Aryeh v Altman, 36 AD3d 492 [1<sup>st</sup> Dept 2007] [collateral estoppel barred a subsequent challenge to the status of a party as a good-faith purchaser where this issue was raised and decided by the Bankruptcy Court in proceedings culminating in an order approving a reorganization plan]; Vanderbilt Realty Corp. v Gordon, 134 AD2d 586 [2d Dept 1987] [because the defendant had a full and fair opportunity to litigate the same issue in the Bankruptcy Court, it was collaterally estopped to challenge the validity of a foreclosure sale]; LaSalle Bank Natl. Assn. v Middlebelt Plymouth Venture, L.L.C., 221 F Supp 2d 792 [ED Mich 2002] [the bankruptcy court's determination that a defendant was a good faith purchaser was a valid, final judgment and collaterally estopped plaintiff from raising defendant's alleged bad faith in a subsequent proceeding]).

Here, the MHR entities have already exercised their full and fair opportunity to litigate the claims that they have again asserted before this court. They have not come forward with any evidence to indicate that they were not afforded a full and fair opportunity to litigate these issues before the Bankruptcy Court (see Baldo v Marine Midland Bank, N.A., 219 AD2d 807, supra). As is clear from the Bankruptcy Court's November 4, 2004 order, the claims of the MHR entities are barred pursuant to the doctrines of res judicata and collateral estoppel, and the MHR entities have not shown any reason why they should be entitled to relitigate these issues which have already been determined.

Accordingly, the court grants Presstek's motion for summary judgment on the ground that the MHR entities' claims are barred by application of the doctrines of res judicata and/or collateral estoppel. In light of the above, the court does not reach the remaining grounds asserted by Presstek for summary judgment.

**CONCLUSION**

It is ORDERED that the motion by defendant Presstek, Inc. for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant Presstek, Inc. as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 19, 2007

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III

**FILED**

JUL 26 2007

NEW YORK  
COUNTY CLERKS OFFICE