

<b>Gaudio v Grabler Bldg. Condominium</b>
2018 NY Slip Op 32443(U)
September 28, 2018
Supreme Court, New York County
Docket Number: 153998/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

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JOSEPH GAUDIO and TIFFANY GAUDIO, Individually  
and on behalf of her minor daughter, ASHLEY GAUDIO,  
Plaintiffs,

Index No.: 153998/16  
DECISION/ORDER

-against-

THE GRABLER BUILDING CONDOMINIUM, THE  
BOARD OF MANAGERS OF THE GRABLER  
BUILDING CONDOMINIUM, JORDAN COOPER, LLP  
and PAUL BRENSILBER,  
Defendants.

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**HON. CAROL R. EDMEAD, J.S.C.:**

In this residential landlord-tenant/property damage action, the defendants each submit separate, identical, motions to dismiss the complaint, pursuant to CPLR 3211, on the ground that plaintiffs' claims are barred by the doctrine of res judicata (motion sequence numbers 003, 004 and 005). For the reasons discussed below, these motions are all granted, and this action is dismissed.

**BACKGROUND**

Plaintiffs Joseph and Tiffany Gaudio, along with their daughter Ashley Gaudio (together, the Gaudios, or plaintiffs), are the owners and occupants of apartment PHA (i.e., penthouse A; hereinafter, the apartment) in a residential condominium building located at 44 Laight Street in the County, City and State of New York (the building). *See* notice of motion (motion sequence number 003), exhibit 1, ¶¶ 5-6. Defendant the Grabler Building Condominium (the condominium) is the building's owner, and the co-defendant Board of Managers of the Grabler Building Condominium (the board) is the building's board of managers. *Id.*, ¶¶ 7-8. Defendant

Jordan Cooper, LLP (Cooper) is the building's registered managing agent, and co-defendant Paul Brensilber (Brensilber), an employee of Cooper, is the building's resident property manager. *Id.*, ¶¶ 9-10. The dispute underlying this action centers on plaintiffs' claim that, between 2008 and 2013, defendants failed to repair water leaks in the apartment that plaintiffs continuously complained of, as a result of which the apartment suffered damage caused by water intrusion, and the plaintiffs suffered various health issues caused by mold infestation. *Id.*, ¶¶ 19-67.

This current, third, action is not the first time that plaintiffs have been involved in litigation over this dispute. First, plaintiffs were named as defendants in a property damage suit filed on December 23, 2015 in this court, under Index Number 102263/15, and entitled *Leslie Harris and Pamela Harris v Joseph Gaudio, Tiffany Gaudio, Quirino Salvati, Q.S.A. Contracting, LLC, C&A Seneca Construction, LLC and Bayview Heating and Plumbing Corp.* (the first action). *See* notice of motion (motion sequence number 003), exhibit 6. The plaintiffs in the first action were the Gaudios' downstairs neighbors in apartment 7A, and were also members of the building's board. *Id.* The co-defendants in the first action were the general contractor and several subcontractors that the Gaudios had retained to perform repair/renovation work in apartment PHA. *Id.* The Gaudios served an answer with counterclaims in the first action on January 12, 2016. *Id.*, exhibit 7. Next, on February 5, 2016, the Gaudios themselves commenced a second action in this court, under Index Number 150982/16, which was entitled *Joseph Gaudio and Tiffany Gaudio v Leslie Harris, Pamela Harris, John Doe, Jane Doe and ABC Companies*, and raised various tortious interference claims (the second action). *Id.*, exhibit 11. The unspecified "John Doe" co-defendants in the second action were described as "co-conspirators that may have aided and abetted defendants [i.e., the Harrises] in their tortious

conduct.” *Id.* The text of the complaint in the second action named both Cooper and Brensilber as such “co-conspirators,” which, perforce, made them “John Doe” defendants. *Id.* The Gaudios’ answer in the first action included counterclaims against the plaintiffs’ therein [i.e., the Harrises] for: 1) intentional abuse of process; 2) intentional aiding and abetting of tortious acts; and 3) conspiracy to commit tortious acts.<sup>1</sup> *Id.*, exhibit 6. The Gaudios’ complaint in the second action alleged causes of action for: 1) intentional abuse of process; 2) intentional aiding and abetting of tortious acts; 3) conspiracy to commit tortious acts; and 4) intentional infliction of emotional distress. *Id.*, exhibit 11.

The first action and the second action were consolidated for joint decision by this court in an order dated April 11, 2016. *See* notice of motion (motion sequence number 003), exhibit 15. Thereafter, both matters were litigated, and on November 14, 2016, the court held a hearing at which it accepted and allocuted a stipulation that all of the parties executed to discontinue both of the actions with prejudice. *Id.*, exhibits 20, 21. The relevant portions of the November 14, 2016 stipulation provide as follows:

“That the [first] action and the [second] action . . . are hereby settled, for all purposes, and are hereby discontinued, with prejudice, and without costs, disbursements or attorney’s fees to any party, pursuant to the following terms/conditions:

“1. The [first action] defendants, Joseph Gaudio and Tiffany Gaudio . . . shall pay the combined total sum of forty-seven thousand (\$47,000.00) dollars to the [first action] plaintiffs . . . in full and complete satisfaction/settlement of all claims, causes of action, damages, etc., known or unknown, of any nature/kind, flowing from any of the causes of action alleged/raised in the plaintiff’s [first

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<sup>1</sup> The Gaudios filed a voluntary discontinuance of these counterclaims *without* prejudice; however, as will be discussed, they later also discontinued the counterclaims *with* prejudice in the November 14, 2016 stipulation that settled the first and second actions. *See* notice of motion (motion sequence number 003), Tollis affirmation, exhibits 8, 19.

action] complaint, and/or amended complaint . . . including any/all claims for costs, disbursements and/or attorney's fees stemming from the prosecution of said claims/causes of action; and/or claimed to have been incurred in the defense of the [second] action . . .;

\* \* \*

"6. The [second action] defendants . . . shall pay the combined total sum of seven thousand seven hundred (\$7,700.00) dollars to the plaintiffs [i.e., the Gaudios] in full and complete satisfaction/settlement of all claims, causes of action, damages, etc., stemming from any of the causes of action alleged/raised in the [second] action . . . including any/all claims for costs, disbursements and/or attorney's fees stemming from the prosecution of said claims/causes of action; and/or claimed to have been incurred in the defense of the [first] action . . .;

\* \* \*

"9. That any/all cross-claims and/or third-party actions/claims raised/asserted and/or commenced by and between the defendants and/or the third-party defendants in the subject two actions are hereby discontinued with prejudice, without costs, disbursements and/or attorney's fees to any party. . . ."

*Id.*, exhibit 19. In addition to so-ordering the stipulation, the court also personally allocuted it for both Joseph and Tiffany Gaudio, and elicited their public statements of understanding that "this resolution terminates your ability to pursue any further claims arising under the two index numbers." *Id.*, exhibit 20.

Despite the foregoing, plaintiffs commenced this action (the current action) on May 12, 2016 by filing a complaint that alleges causes of action for: 1) breach of contract (against the condominium and the board); 2) breach of contract (against Cooper); 3) breach of fiduciary duty (against the board); 4) aiding and abetting breach of fiduciary duty (against Cooper and Brensilber); 5) tortious interference with contract (against Cooper and Brensilber); 6) negligence (against Cooper and Brensilber); and 7) negligence (against the condominium and the board). *See* notice of motion (motion sequence number 003), exhibit 1. The condominium and the board

filed a joint answer with cross-claims on August 8, 2016, Cooper filed an answer with cross-claims on August 9, 2016, and Brensilber filed an answer with cross-claims on September 16, 2016. *Id.*, exhibits 2, 4, 5.

Thereafter, on April 4, 2017, the Gaudios commenced yet another action in this court, under Index Number 651810/17, by filing a summons and complaint that raised a single cause of action against the condominium and the board for breach of contract over their alleged failure to return the Gaudios' apartment security deposit (the fourth action). The parties settled the fourth action via a stipulation, dated April 25, 2017, that provided, in pertinent part, as follows:

“This shall further confirm that we hereby release each other from all claims and causes of action relating to, or arising out of, the disposition of the security deposit only. Such release shall not apply to any other claims or causes of action and, in the interest of clarity, shall specifically not affect or in any way limit the causes of action set forth in your complaint bearing Index Number 153998/16 [i.e., the current action] or any of the defenses asserted or un-asserted by any of the defendants in that action, it being our mutual intent to solely release each other from any claims or causes of action arising from or related to the disposition of the security deposit.”

See Basil affirmation in opposition (motion sequence number 003), exhibit H. After executing the fourth action settlement, the parties filed a notice of discontinuance on June 16, 2018.

Now before the court are the defendants' respective motions to dismiss the complaint in the current action (motion sequence numbers 003, 004 and 005)

## DISCUSSION

### The Condominium's and the Board's Motion

The joint motion by the condominium and board (motion sequence number 003) seeks to dismiss the Gaudios' complaint as against them, pursuant to CPLR 3211 (a) (5), on the ground of res judicata; regarding which doctrine, the Court of Appeals recently observed as follows:

“The preclusive effect of a judgment is determined by two related but distinct concepts - issue preclusion and claim preclusion - which collectively comprise the doctrine of ‘res judicata.’ Issue preclusion, also known as collateral estoppel, bars the relitigation of ‘an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.’ As a result, the determination of an essential issue is binding in a subsequent action, even if it recurs in the context of a different claim.

“While issue preclusion applies only to issues actually litigated, claim preclusion (sometimes used interchangeably with ‘res judicata’) more broadly bars the parties or their privies from relitigating issues that were or could have been raised in that action. The doctrine ‘encompasses the law of merger and bar’ - it precludes the relitigation of all claims falling within the scope of the judgment, regardless of whether or not those claims were in fact litigated. As such, claim preclusion serves to bar not only ‘every matter which was offered and received to sustain or defeat the claim or demand,’ but also ‘any other admissible matter which might have been offered for that purpose.’ In other words, claim preclusion may ‘foreclos[e] litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.’

“Collectively, these doctrines serve to ‘relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.’ By promoting consolidation, res judicata shields litigants from undue harassment and protects against the substantial time and expense associated with needless and repetitive litigation. The reduction of duplicative proceedings similarly furthers the goals of convenience, efficiency and judicial economy - the same trial court presides over unified discovery, all relevant motions, and a single trial. Res judicata also preserves the integrity of the courts by fostering finality and minimizing the risk of conflicting judgments, which serve only to undermine public confidence in the judicial process.”

*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72-73 (1<sup>st</sup> Dept 2018)

(internal citations omitted). The condominium and board also cite a line of appellate case law that affirms the rule that “a stipulation of discontinuance with prejudice is accorded the same res judicata effect as a judgment on the merits.” See notice of motion (motion sequence number 003), Tollis affirmation, ¶¶ 47-50; see, e.g. *Magen David of Union Sq. v 3 W. 16th St., LLC*, 132 AD3d 503 (1<sup>st</sup> Dept 2015); *Benjamin v New York City Dept. of Health*, 57 AD3d 403 (1<sup>st</sup> Dept

2008); *Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292 (1st Dept 2005).

At the outset, the court notes that, although the condominium's and board's moving papers do not overtly distinguish between the "issue preclusion" and "claim preclusion" theories of res judicata, it is nonetheless evident that their motion is based on the latter theory. The complaint in the current action asserts claims against the condominium and board for: 1) breach of contract; 2) breach of fiduciary duty; and 3) negligence. *See* notice of motion (motion sequence number 003), exhibit 1 (complaint), ¶¶ 68-72, 78-82, 98-101. Although neither the condominium nor the board was a named party in the first or the second actions, Leslie Harris (Harris) was a named party in both (a plaintiff in the former and a defendant in the latter), and in those actions the Gaudios claimed that Harris was acting in his official capacity as a board member. *Id.*, exhibits 6, 11. The Gaudios' answer in the first action raised counterclaims against Harris for: 1) intentional abuse of process; 2) intentional aiding and abetting of tortious acts; and 3) conspiracy to commit tortious acts. *Id.*, exhibit 6. The Gaudios' second action complaint raised similar causes of action against Harris for: 1) intentional abuse of process; 2) intentional aiding and abetting of tortious acts; 3) conspiracy to commit tortious acts; and 4) intentional infliction of emotional distress. *Id.*, exhibit 11. Clearly, none of these previous claims exactly matches the causes of action in the current complaint (i.e., breach of contract, breach of fiduciary duty and negligence). However, in their motion, the condominium and board argue that "the claims herein are based upon the same actions, conduct and occurrences which form the basis of the prior action[s]." *See* notice of motion (motion sequence number 003), Tollis affirmation, ¶¶ 51-65. It is, thus, apparent that the condominium's and board's res judicata argument herein is based on a theory of "claims preclusion," rather than "issue preclusion," since it alleges that the

prior actions and the current actions share the same subject matter, even if all of the claims are denominated differently.

The condominium's and board's motion next cites two older Court of Appeals decisions which propounded the following analysis of the "claims preclusion" aspect of the doctrine of res judicata:

"... in deciding res judicata issues, we have moved to a more pragmatic test, which sees a claim or cause of action as 'coterminous with the transaction regardless of the number of substantive theories or variant forms of relief . . . available to the plaintiff.' Thus, in *Matter of Reilly v. Reid* (45 NY2d 24, 29 [1978]), we announced that, from the perspective of claim preclusion '[a] "cause of action" may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery. A "cause of action" may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated "causes of action" may nevertheless be grounded on the same gravamen of the wrong upon which the action is brought.' This holds true 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.' For, what 'factual grouping' constitutes a 'transaction' or 'series of transactions' depends on how 'the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understanding or usage.'"

*Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 (1981) (internal citations omitted); *see also O'Brien v City of Syracuse*, 54 NY2d 353, 357-358 (1981). In its more recent decision in *Paramount Pictures Corp. v Allianz Risk Transfer AG*, the Court of Appeals additionally cited with approval the federal rule that, in claims preclusion analysis, "the question is whether the claim was sufficiently related to the claims . . . in the first proceeding that it *should have been asserted* in that proceeding." 31 NY3d at 73, *quoting Pike v Freeman*, 266 F3d 78, 91 (2d Cir 2001) (emphasis in original). The condominium and board then make that very assertion. They

specifically note that: 1) the Gaudios have “alleged the same end result” in this action as they did in the first and second actions (i.e., harm to the apartment consisting of water damage and mold infestation); 2) the Gaudios alleged in the first and second actions that Harris, acting in his capacity as a board member, engaged in a conspiracy with other members of the board, with Cooper and with Brensilber, to commit “tortious acts” which led to that “end result”; 3) the Gaudios have implicitly and/or explicitly acknowledged that their claims in the current action derive from the same facts that they alleged in the first and second actions, since their response to the condominium’s and board’s demand for a bill of particulars herein specifically refers to the factual allegations that were contained in their pleadings in the first and second actions, and states that they adopt and incorporate by reference those factual allegations with ones that they raise in the current action; and 4) that those factual allegations involve the same unaddressed “repair and maintenance issues,” the same resulting “water infiltration and mold infestation,” and the same unreimbursed expenses for “totally tearing out and renovating the apartment” and temporarily “vacating the premises” for a replacement apartment, during the same 2008-2013 time line. *See* notice of motion (motion sequence number 003), Tollis affirmation, ¶¶ 55-63. The condominium and board conclude that, although the causes of action asserted against them in the current action are nominally different than the ones raised in the first and second actions, those claims nevertheless “arise out of the same events and are predicated upon the same factual grouping and transactions for purposes of res judicata” as the earlier claims, and should therefore be barred under the “claims preclusion” branch of the doctrine of res judicata. *Id.*, ¶ 65.

The Gaudios make two arguments in response. First, they assert that the fourth action settlement “confirmed that the Gaudios were entitled to pursue their claims in the [current

action].” See plaintiffs’ mem of law (motion sequence number 003) at 19-24. They specifically rely on the portion of the fourth action settlement that provides that “in the interest of clarity, [this release] shall specifically not affect or in any way limit the causes of action set forth in” the current action, and argue that this language “clearly and unambiguously . . . preempts and moots defendants’ res judicata claims.” *Id.* at 20-23. The condominium and board reply that the Gaudios’ reading of the fourth action settlement “is indelibly and fatally flawed,” because it ignores the subsequent language that the settlement also does not limit “any of the defenses asserted . . . by any of the defendants in [the current] action, it being our mutual intent to solely release each other from any claims or causes of action arising from or related to the disposition of the security deposit.” See Tollis reply affirmation, ¶¶ 7-18. The condominium and board argue that, when it is read in its entirety, there is no way to reasonably interpret the fourth action settlement as contemplating a waiver of their res judicata defense to the claims in the current action. *Id.* The court agrees that the Gaudios’ reading of the fourth action is plainly incomplete and, therefore, deficient. The argument in the Gaudios’ opposition papers speaks only to the portion of the fourth action settlement that preserves the causes of action in the current action, but does *not* address at all the portion of the settlement that also preserves the defenses in the current action. Plainly stated, the Gaudios have only made half an argument. The court rejects this argument, however, because the fourth action settlement clearly preserves both the causes of action *and* the defenses in the current action for judicial review.

Next, the Gaudios argue that “the settlement of the [second action]<sup>2</sup> did not bar the

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<sup>2</sup> The court first that the Gaudios’ argument evidently ignores the fact that the November 14, 2016 stipulation settled both the first action, which included their counterclaims against Harris, *and* the second action. See notice of motion (motion sequence number 003),

present mold case under the doctrine of res judicata,” because they “did not involve the ‘same transaction.’” See plaintiffs’ mem of law (motion sequence number 003) at 24-30. The Gaudios specifically assert that: 1) their “mold claims [i.e., the allegations of personal injuries resulting from mold infestation that the Gaudios raise in the current action] . . . were never in litigation” in the first or second action; and 2) the text of the November 14, 2016 stipulation did not include any waiver of those “mold claims.” *Id.* The condominium and board reply that: 1) the Gaudios are precluded from challenging the finality of the November 14, 2016 stipulation, as a matter of law, since they have failed to meet the legal standard necessary to mount such a challenge; and 2) the Gaudios’ challenge to their res judicata defense also fails, since it is clear that the Gaudios’ claims in the current action arise from the “same transaction” as the claims and counterclaims that were settled in the first and second actions. See Tollis reply affirmation (motion sequence number 003), ¶¶ 19-57. For the following reasons, the court agrees with the condominium and board.

First, the condominium and board have correctly stated the law regarding challenges to stipulations of settlement. In *Hallock v State of New York* (64 NY2d 224 [1984]), the Court of Appeals observed that:

“Stipulations of settlement are favored by the courts and not lightly cast aside. This is all the more so in the case of ‘open court’ stipulations within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation.”

64 NY2d at 230 (internal citations omitted); see also *City of New York v 130/40 Essex St. Dev.*

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Tollis affirmation, exhibit 19.

*Corp.*, 302 AD2d 292 (1<sup>st</sup> Dept 2003). Here, however, the Gaudios' opposition papers are devoid of any argument regarding "fraud, collusion, mistake or accident." Instead, they merely assert that "the expectations of the parties . . . was that the [November 14, 2016] settlement . . . did not include the Gaudios' claims in this mold case." See plaintiffs' mem of law (motion sequence number 003) at 30. Even if this were true, which does *not* appear to be the case, it would not constitute a legally sufficient ground upon which to challenge the validity of the November 14, 2016 stipulation.<sup>3</sup> Therefore, the court rejects the Gaudios' opposition argument.

Second, the Gaudios' "same transaction" argument turns on its assertion that there were no specific "mold claims" references in either the first or second actions' pleadings, or the text of the November 14, 2016 stipulation. See plaintiffs' mem of law (motion sequence number 003) at 24-30. Under the Court of Appeals' analysis in *Paramount Pictures Corp. v Allianz Risk Transfer AG*, it appears that this argument addresses the "issue preclusion" variety of the doctrine of res judicata, since it asserts that "an issue of fact or law actually [was not] litigated and resolved in a valid court determination essential to the prior judgment." 31 NY3d at 72-73. However, as was previously discussed, the condominium's and board's res judicata defense herein is of the "claim preclusion variety, which "serves to bar not only 'every matter which was offered and received to sustain or defeat the claim or demand,' but also 'any other admissible matter which *might have been* offered for that purpose.'" *Id.* (Emphasis added). Here, it is clear

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<sup>3</sup> The court also notes that the Gaudios opposition papers do not mention the fact that, after the parties executed the November 14, 2016 stipulation, the court itself allocuted that stipulation to both Joseph and Tiffany Gaudio on the record, and elicited their statements of understanding that the stipulation precluded them from pursuing *any* claims arising out of the subject matter of either the first or second actions. See notice of motion (motion sequence number 003), Tollis affirmation, exhibit 20.

that the first and second actions involved claims (and counterclaims) for property damage to the Gaudios' apartment that resulted from water intrusion and mold infestation. *See* notice of motion (motion sequence number 003), Tollis affirmation, exhibits 7, 11. It is also clear that the Gaudios *could have* raised personal injury claims resulting from that alleged mold infestation during those actions, as well.<sup>4</sup> The Gaudios' arguments herein indicate that they were certainly aware of such claims at the time that they settled the first and second actions; indeed, they assert that they had already filed the current "mold" action at the time that the court allocuted the November 14, 2016 stipulation. *See* plaintiffs' mem of law (motion sequence number 003) at 12-17. Further, the Gaudios' opposition papers are also devoid of any allegation that they were unaware of the ill effects caused by mold intrusion; indeed, they assert that it was just this awareness that caused them to temporarily relocate from the apartment. *Id.* Given these assertions, it is impossible to find, as the Gaudios request, that the claims in the current action did not arise from the "same transaction" as that which was pled and settled in the first and second actions. Briefly, the Gaudios' claims against the condominium and board herein (i.e., breach of contract, breach of fiduciary duty and negligence) each assert that the condominium and board owed them a duty (be it contractual, fiduciary and/or at common-law) to perform work in the apartment, that the condominium and board violated this duty, and that water damage and mold intrusion in the apartment ensued, which - in turn - caused physical damage to the apartment and personal injuries to themselves. *See* notice of motion (motion sequence number

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<sup>4</sup> It is further clear that, despite the Gaudios' persistently referring to the current action as the "mold case," the prayer for relief in their complaint seeks monetary compensation for property damage, relocation and legal expenses and diminution of value to the apartment in addition to compensation for physical injuries allegedly caused by mold. *See* notice of motion (motion sequence number 003), Tollis affirmation, exhibit 1.

003), Tollis affirmation, exhibit 1. These are the same factual claims that were made in the first and second actions. *Id.*, exhibits 7, 11. Further, as was previously observed, the Gaudios' pleadings in those actions alleged that Harris was acting in his capacity as a board member, and in conspiracy with the board, Cooper and Brensilber, to bring about the aforementioned violation of duty which gave rise to the Gaudios' claims. *Id.* As a result, it is clear that the claims that the Gaudios are pursuing herein arose out of the same series of "transactions" as the claims and counterclaims in the first and second actions which were settled on November 14, 2016. The mere fact that the former claims were characterized as "conspiracies to commit" and/or the "aiding and abetting of" various alleged "tortious acts," while the instant claims are styled as "breaches of duty," sounding in tort and/or contract, does not diminish the underlying factual connection of these claims, or change the legal expectation that the entire "transaction" should have been tried as a single "unit." *Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d at 72-73. Because the instant third action claims clearly could have been tried in the first and/or the second actions, and because those actions were settled and discontinued with prejudice, it is clear that the Gaudios' current claims against the condominium and board are barred by the "claims preclusion" aspect of the doctrine of res judicata. Therefore, the court finds that the condominium's and board's motion to dismiss the complaint as against it, pursuant to CPLR 3211 (a) (5), should be granted on that ground.

The Gaudios' final opposition argument, regarding privity, may be easily disposed of as semantic. Briefly, in the first and second actions, the Gaudios alleged that Harris conspired with Brensilber and Cooper to commit "negligent and tortious activity" through his "abuse of his position as a member of the building's" board. *See* notice of motion (motion sequence number

003), Tollis affirmation, exhibit 7, ¶ 23; exhibit 11, ¶ 8. Now, however, the Gaudios claim that “Harris never represented the interests of the board during any litigation activities.” *See* plaintiffs’ mem of law (motion sequence number 003), at 30-33. The Gaudios cannot “have it both ways,” especially since they have already settled and discontinued all of their “litigation activities” involving Harris with prejudice. The Gaudios themselves acknowledge that the court had requested that the board be named as a party in the second action, but that this was not done. *Id.*, exhibit 11, ¶ 39. The Gaudios thus lost their opportunity to argue about any distinction between Harris and the board when they executed the November 14, 2016 settlement. Therefore, the court now rejects the Gaudios’ privity argument as spurious and impermissible. Accordingly, for the foregoing reasons, the court grants the condominium’s and board’s motion and dismisses the instant complaint as against them.

#### Brensilber’s Motion

Brensilber’s motion (motion sequence number 004) seeks the same relief, on the same grounds, as did the motion by the condominium and board. In the current action, the Gaudios raise claims against Brensilber for: aiding and abetting breach of fiduciary duty; tortious interference with contract; and negligence. The court notes that Brensilber was not directly named as a party in either the first or the second actions, and that he was not a signatory to the November 14, 2016 stipulation which settled those actions. However, the court also notes that the Gaudios did name Brensilber as a “co-conspirator” in their counterclaims against Harris in the first action, and also effectively named him as a “John Doe”/co-conspirator defendant with Harris in their claims in the second action. *See* notice of motion (motion sequence number 004), Pressman affirmation, exhibits D, E. The first action counterclaims against Harris asserted:

intentional abuse of process, intentional aiding and abetting of tortious acts and conspiracy to commit tortious acts. *Id.*, exhibit D. The second action asserted claims against Harris (and “John Doe”; i.e., Brensilber) including: intentional abuse of process, intentional aiding and abetting of tortious acts, conspiracy to commit tortious acts and intentional infliction of emotional distress. *Id.*, exhibit E.

In his motion, Brensilber argues that “the claims asserted herein arise from the same transaction(s) as the underlying [i.e., first and second] actions and are thus precluded by res judicata,” because those claims “were or could have been raised in the underlying actions.” *See* notice of motion (motion sequence number 004), Shay affirmation, ¶¶ 63-81. The Gaudios respond that the claims in the “[second action] and this mold case did not involve the ‘same transaction.’” *See* plaintiffs’ mem of law (motion sequence number 004), at 21-25. The Gaudios specifically note that: 1) their claims in the second action were asserted against Harris, rather than Brensilber; 2) the claims in the second action asserted different causes of action than the ones that they raised against Brensilber in the current action; and 3) the facts alleged in the second action concerned a “conspiracy,” while the facts alleged in the current case do not. *Id.* The Gaudios then conclude with the assertion that “the fact that the complaint[s] in both cases allege[] property damage and personal injuries resulting from mold infiltration is not dispositive.” *Id.* at 25. Brensilber replies that: 1) the text of the second action complaint clearly shows that Brensilber was a “John Doe” defendant in that action; and 2) the factual allegations of both complaints include claims that “Brensilber’s negligence resulted in the formation of mold in the plaintiffs’ premises, and delayed the remediation and renovation of the premises.” *See* Fenyes reply affirmation (motion sequence number 004), ¶¶ 11-28. The court again believes that

the parties are conflating “issue preclusion” analysis with “claim preclusion” analysis, but nevertheless finds for Brensilber.

As the Court of Appeals has noted, “[i]dentity of parties [is] an essential element for application of the doctrine of issue preclusion or collateral estoppel.” *Brown v City of New York*, 60 NY2d 897, 898 (1983). However, Brensilber’s dismissal argument is based on “claims preclusion” res judicata analysis. Therefore, the Gaudios’ attempt to dispute whether or not Brensilber was defendant in the first or second action is a red herring, at best.<sup>5</sup> Further, the Gaudios’ assertion, that the fact that the complaints in the second and current actions both allege property damage and personal injuries resulting from mold infiltration is “not dispositive,” is simply incorrect. The court has already determined that this point *is* dispositive, to the extent that the factual allegations regarding the various “tortious acts” and related activity are the same as the factual allegations that underpin the various permutations of “breach of duty” that are alleged in the current action. In Brensilber’s case, the allegations plainly match. The “tortious acts” that are referred to in the three claims in the second action which implicate Brensilber included “negligent . . . and intentional actions which caused . . . delays in the reconstruction of the” apartment, “unwarranted rejections of submissions for the reconstruction” of the apartment, “refusal to replace the roof,” and “making unwarranted complaints,” all of which resulted in “inadequate maintenance and repair” which led to the damages that the Gaudios claim to have suffered. *See* notice of motion (motion sequence number 004), Pressman affirmation, exhibit E, ¶¶ 16-18, 28. The allegations in the current action are that Brensilber breached or assisted in the

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<sup>5</sup> In any case, the court has already determined that the pleadings in the second action plainly disclose that Brensilber *was* a “John Doe” defendant therein, whether or not he was named in the action’s caption.

breach of various duties when he “failed and refused to maintain and/or repair the common areas” of the building, when he “acted to unnecessarily delay the remediation and reconstruction of the apartment,” when he “interfered with the contractual relationships” between the Gaudios and their contractors for the same reasons, and when he failed to act “in a non-negligent . . . manner regarding the maintenance and general management of the building.” *Id.*, exhibit A, ¶¶ 84, 89, 93. It is clear that these two sets of allegations involve the same factual “transaction;” to wit, that Brensilber owed the Gaudios obligations to adequately manage, maintain and repair the building, that Brensilber violated those repair and maintenance obligations, which resulted in water damage and mold intrusion in the Gaudios apartment (which, in turn, caused physical damage to the apartment and personal injuries to the Gaudios), and that Brensilber also violated his management obligation, which resulted in the Gaudios being unable to effect timely renovations to the apartment (which, in turn, caused them to suffer financial damages). It is also evident that “the fact that the complaints in the second and current actions both allege property damage and personal injuries resulting from mold infiltration” is dispositive, whereas the fact that the Gaudios chose to denominate their claims in the current action as facially different causes of action from those which they delineated in the second action is of no moment. The doctrine of res judicata provides that all causes of action that arise out of the same factual “transaction” must be tried as a “unit,” and bars a plaintiff from subsequently asserting causes of action based on the “transaction” that should have been tried as part of that “unit.” *Smith v Russell Sage Coll.*, 54 NY2d at 192-193; *Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d at 73. That doctrine now bars the Gaudios from asserting their three claims against Brensilber in the current action, because they could have and should have asserted them in the

second action. Accordingly, the court finds that Brensilber's motion should be granted, and that the instant complaint should be dismissed as against him.

#### Cooper's Motion

Cooper's motion (motion sequence number 005) seeks the same relief on the same grounds as Brensilber's motion did. The court notes that Cooper, Brensilber's employer, stood in the same shoes as Brensilber vis-a-vis the Gaudios in both the second action and the current action, since they are named in the same causes of action in both actions and are alleged to have performed the same wrongful acts in both, as well.<sup>6</sup> Cooper also raises the same "claims preclusion" argument as Brensilber that the Gaudio's claims against it in the current action should be dismissed under the doctrine of res judicata. *See* notice of motion (motion sequence number 005), Sutton affirmation, ¶¶ 18-35. The Gaudios' opposition papers contain the same arguments, word for word, as they asserted against Brensilber, and do not assert any factual or legal distinctions between the two parties. *See* plaintiffs' mem of law (motion sequence number 005), at 23-28; plaintiffs' mem of law (motion sequence number 004), at 21-25. Therefore, the court rejects the Gaudios' opposition arguments for the reasons that were discussed in the preceding portion of this decision, and finds that Cooper's motion, too, should be granted for those same reasons. Accordingly, the court grants Cooper's motion, and dismisses the instant complaint as against it.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

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<sup>6</sup> The court also notes, in passing, that the pleadings in the second action make it clear that Cooper, like Brensilber, was a "John Doe" defendant in that action, even though Cooper's name did not appear in the caption.

ORDERED that the motion, pursuant to CPLR 3211, of defendants the Grabler Building Condominium and the Board of Managers of the Grabler Building Condominium (motion sequence number 003) is granted and the complaint is dismissed, with prejudice, in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

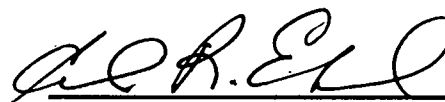
ORDERED that the motion, pursuant to CPLR 3211, of defendant Paul Brensilber (motion sequence number 004) is granted and the complaint is dismissed, with prejudice, in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion, pursuant to CPLR 3211, of defendant Jordan Cooper, LLP (motion sequence number 005) is granted and the complaint is dismissed, with prejudice, in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for The Grabler Building Condominium shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

Dated: New York, New York  
September 28, 2018

ENTER:



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDM EAD**  
J.S.C.