

**Gaughan v Russo**

2025 NY Slip Op 33158(U)

August 19, 2025

Supreme Court, New York County

Docket Number: Index No. 651251/2023

Judge: Nicholas W. Moyne

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NICHOLAS W. MOYNE PART 41M**

*Justice*

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AYLIN GAUGHAN,

Plaintiff,

- v -

MICHAEL JOSEPH RUSSO, IRENE RUSSO, JACQUELINE  
DELANEY, SAL MONACO, SIGNATURE BANK,

Defendant.

**INDEX NO. 651251/2023**

04/24/2023,  
05/19/2023,  
05/16/2023,  
05/17/2023,  
09/11/2023,  
03/13/2024,

**MOTION DATE 04/29/2024**

001 002 003  
004 005 006

**MOTION SEQ. NO. 007**

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 51, 52

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 58, 59, 60, 67

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 30, 31, 32, 61, 62, 63, 64, 65, 66, 72

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 68

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 88, 89, 90, 91

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 117

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

Upon the foregoing documents, it is

Motion Sequences 001-007 are consolidated herein for decision. Plaintiff, Aylin Gaughan, *pro se*, commenced the above-entitled action against the defendants, Michael Joseph Russo ("MR"), Irene Russo ("IR"), Jacqueline Delaney ("JD"), Sal Monaco ("SM"), and Signature Bank,<sup>1</sup> to recover amounts and/or damages allegedly sustained due to improper or unlawful acts committed by the defendants.

The Court now considers the following seven motions:

1. In Motion Sequence 001, defendant MR moves for an order, pursuant to CPLR §§ 3211(a)(4), (a)(5), (a)(7), dismissing the complaint on grounds that another action involving the same claims is pending between the parties, the claims are barred by the statute of limitations, collateral estoppel, *res judicata*, statute of frauds, the complaint fails to state a cause of action and/or fails to satisfy CPLR §§ 3013 and 3014. Alternatively, MR is seeking sanctions against the plaintiff and to join/consolidate this action and the other pending action (Index Number 101600/2017).
2. In Motion Sequence 002, defendant SM moves for an order, pursuant to CPLR §§ 3211(a)(5) and (7), dismissing the complaint in its entirety as the allegations fail to state a cause of action and the claims are barred by the doctrine of *res judicata* and the statute of limitations.
3. In Motion Sequence 003, defendants IR and JD also move for an order pursuant to CPLR §§ 3211(a)(4), (a)(5), and (a)(7), dismissing the complaint as the claims are barred by *res judicata*, fail to state a cause of action, and/or fail to satisfy the requirements of CPLR §§ 3013 and 3014. Defendants IR and JD also seek to recover legal fees and sanctions against plaintiff for frivolous conduct.
4. Motion Sequence 004 is plaintiff's motion that is identical in substance to that sought in Motion Sequence 005.<sup>2</sup>
5. In Motion Sequence 005, plaintiff's omnibus motion, plaintiff moves for an order, pursuant to CPLR §§ 3212, 3216, and 22 NYCRR § 130.1-1, granting summary judgment against all defendants, to strike Attorney Marc Ialenti's comments, and

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<sup>1</sup> Signature Bank was closed on or around March 12, 2023, by the New York State Department of Financial Services and Federal Deposit Insurance Corporation was appointed as the Receiver for Signature Bank, charged with winding up Signature Bank's affairs.

<sup>2</sup> The Court notes that although filed under a separate motion sequence number, Motion Sequence 4, the moving papers and notice are labeled as a cross-motion to Motion Sequence 003. The motion being given its own, distinct motion sequence number seems to be a clerical error.

for sanctions against defendants IR and JD and their counsel on the grounds that justice so requires in order for all issues between the parties to be fully litigated.

6. In Motion Sequence 006, Federal Deposit Insurance Corporation, in its capacity as Receiver for Signature Bank ("FDIC-Receiver"), moves for an order, pursuant to CPLR § 3211, to dismiss the complaint with prejudice on the grounds that the claims are barred by res judicata, collateral estoppel, the statute of limitations, the complaint fails to state a cause of action and plaintiff failed to comply with FDIC administrative claims processes.
7. In Motion Sequence 007, FDIC-Receiver moves for an order, pursuant to CPLR §§ 1021 and 1017, seeking to substitute FDIC-Receiver as the party-defendant in place of Signature Bank and to amend the caption to reflect this substitution. The motion also requests that the amendment of the caption have no impact on the parties' rights with respect to any motions pending before the Court.

Procedural Background:

Plaintiff commenced the present action against the above-named defendants on or around March 9, 2023, under the Index No. 651251/2023 (the "New Action"). In her complaint for this New Action, plaintiff alleges sixteen causes of action against the various defendants, including those for: (1) "Fraud"; (2/3) "Breach of Promissory Estoppel/Breach of Contract and Breach of Cove[nant and Good Faith Dealing"; (4) "Unjust Enrichment"; (5) "Intentional Infliction of Harm and Emotional Distress"; (6) MR and IR "Entered Into Agreements in Obviously Bad Faith and Fraudulent Intent/Fraudulent Inducement"; (7/8) "Duty of Care and Justifiable Reliance"; (9) IR "Acted as a Representative a Guarantor and a Sure[ty]/Breach Of Contract"; (10) "Misapplication of Funds"; (11) "Interference"; (12) "Defendants Aided And Abetted Conversion and Fraud"; (13) "Willful and Intentional Fraud and Intention to Deceive Amount to Causation"; (14) "Negligence"; (15) "Falsity and Knowledge of Falsity"; and (16) "Conversion" (NYSCEF Doc. No. 2).

However, the New Action follows a prior New York Supreme Court action commenced by the plaintiff under Index No. 101600/2017 (the "Prior Action") on or around November 9, 2017.<sup>3</sup> At some previous point, both the Prior Action and the New Action were assigned to Justice Lucy A. Billings. Now, as of the date of this Decision and Order, the Prior Action is assigned to Justice James G. Clynnes of this Court.

A critical aspect of the procedural history for the New Action is the plaintiff's assertion that during a Court appearance in the Prior Action, the Hon. Lucy Billings repeatedly directed the plaintiff to "start another action". Specifically, on February 9, 2023, the parties appeared in front of Judge Billings for the purposes of conducting oral

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<sup>3</sup> This Court takes judicial notice of the court documents (Orders/Decisions) issued under Index No. 101600/2017, as a Court may take judicial notice of a record in the same Court in some other action when the document is a reliable record such as a prior Order (*Caffrey v N. Arrow Abstract & Settlement Services, Inc.*, 160 AD3d 121, 126 [2d Dept 2018]).

argument on the pending motions in the 2017 action: Motion Sequence 009- MR's motion for summary judgment; Motion Sequence 010- the plaintiff's motion for summary judgment; and Motion Sequence 011- the plaintiff's motion to amend the complaint to add IR and JD (see NYSCEF Doc. No. 90). Plaintiff contends that on at least four occasions during the appearance, she specifically asked Judge Billings for clarification or that Judge Billings stated that plaintiff should commence a new action to deal with the additional claims/allegations. This directive, according to Plaintiff, was because the Court was only making a decision regarding the "fraudulent promissory note" and not the full amount defrauded from Plaintiff, nor any other fraud allegations and claims. Plaintiff asserts that on March 9, 2023, the plaintiff did as Judge Billings directed and started the New Action under a separate Index Number.

Relevant case or procedural history as it relates to each of the defendants is provided in further detail in the discussion of each of the motions below.

Discussion:

Motion Sequence 001: Defendant Michael Joseph Russo's Motion to Dismiss:

In Motion Sequence 001, defendant MR moves, pursuant to CPLR §§ 3211(a)(4), (a)(5), and (a)(7), to dismiss the complaint on grounds that there is another action pending between the parties for the same causes of action, the claims are barred by statute of limitations, res judicata/collateral estoppel, the statute of frauds, the complaint fails to state a cause of action and/or fails to comply with CPLR §§ 3013 and 3014. In the alternative, MR seeks sanctions against plaintiff for frivolous conduct and requests that the above-entitled action be consolidated with the Prior Action or joined for purposes of discovery and trial. The motion to dismiss is granted in part and is otherwise denied.

Defendant MR asserts that, pursuant to CPLR § 3211(a)(4), the New Action must be dismissed as there is another action pending between the same parties for the same causes of action: the Prior Action proceeding under the 2017 Index Number. By summons and complaint dated November 17, 2017, plaintiff commenced the Prior Action against MR alleging various claims based on alleged conduct involving the use of her funds/checks from 2015 and 2016 and/or a promissory note executed by MR in 2017 (NYSCEF Doc. No. 13). Then, on or around March 9, 2023, plaintiff filed the summons and complaint in the New Action again alleging claims against MR based on the same alleged 2015 and 2016 conduct and 2017 promissory note (NYSCEF Doc. No. 1; 2). It has not been disputed that these two actions concern the same parties.

CPLR § 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *Shah v RBC Capital Markets LLC*, 115 AD3d 444, 444-45 [1st Dept 2014]). "Pursuant to CPLR 3211(a)(4), an action should be dismissed where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter" (*Finch Prop. Holdings I, LLP v Blumenfeld*, 234 AD3d 521, 523-24 [1st Dept 2025] [internal quotations omitted]). "[W]here another action is pending, a major

concern, as a matter of comity, is to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction” (*White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 93 [1st Dept 1997]). Therefore, with respect to the parties, there must be substantial identity, and with respect to the subject of the actions, the relief sought must be the same or substantially the same (*Id.* at 93-94).

With respect to the plaintiff’s claims against MR, the causes of action in the New Action are either identical, substantially the same, or arise out of the same series of alleged wrongs as those in the Prior Action (*Stewart Tit. Ins. Co. v Wingate, Kearney & Cullen*, 145 AD3d 462, 463 [1st Dept 2016]). In the Prior Action, the complaint, as amended, included causes of action against MR for: (1) fraud; (2/3) breach of promissory estoppel/breach of contract and breach of covenant and good faith dealing; (4) unjust enrichment; (5) intentional infliction of emotional distress; (6) entering into agreements in obviously bad faith and fraudulent intent; (8) unjust enrichment and fraud- fraudulent conversion of funds; (9) fraudulent inducement; (10) breach of fiduciary duty; (11) criminal misrepresentation; (12) breach of contract; and (13) unjust enrichment (see NYSCEF Doc. No. 16).<sup>4</sup> The complaint in the New Action includes the same first through six causes of action against MR and additional claims for: (7/8) duty of care and justifiable reliance; (10) misapplication of funds; (11) interference; (13) willful and intentional fraud and intention to deceive; (14) negligence; and (15) falsity. Notably, the causes of action need not be identical (*GMF 157 LP v Inspirit Dev. and Constr., LLC*, 235 AD3d 493, 494 [1st Dept 2025]), as “it is inconsequential that different legal theories or claims were set forth in the two actions” (*Shah v RBC Capital Markets LLC*, 115 AD3d 444, 445 [1st Dept 2014]). Therefore, while they may be designated differently in the two complaints, there is a substantial identity of the causes of action in both the New Action and Prior Action.

There is no question that at the time the plaintiff commenced the New Action, the Prior Action was still pending and remained active as against MR (*compare DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512, 514 [1st Dept 2018]). MR filed the present motion to dismiss the complaint in the New Action on or around April 24, 2023, when, at the time, there were three pending motions in the Prior Action: Motion Sequence 009- MR’s motion for summary judgment; Motion Sequence 010- plaintiff’s motion for summary judgment; and Motion Sequence 011- plaintiff’s motion to amend the complaint. On or around February 9, 2023, the Hon. Lucy Billings held oral argument for these three motions, but reserved decision and/or had not yet rendered a determination (see NYSCEF Doc. No. 90).

However, on June 16, 2023, subsequent to the commencement of the New Action and the filing of MR’s motion herein, the Court issued a Decision and Order on these three motions in the Prior Action, in which: (1) the plaintiff’s motion for summary judgment was granted in part and plaintiff was awarded damages on the claim for

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<sup>4</sup> In the Prior Action, plaintiff has filed multiple documents labeled as “proposed amended complaint” and it is not entirely clear to this Court which document is the governing pleading for the Prior Action and this Court will refer to the document labeled and filed under “Second Amended Complaint” as the supposed governing pleading for purposes of this motion (NYSCEF Doc. No. 16).

breach of promissory note; (2) MR's motion for summary judgment was denied; and (3) the plaintiff's motion to amend was denied as moot (NYSCEF Doc. No. 84). The plaintiff then appealed this Decision and Order to the First Department. Accordingly, at the time this Decision and Order was issued and then during the time it was under review, the Prior Action was disposed and MR's motion to dismiss the claims in the New Action, to the extent predicated on CPLR 3211(a)(4), became largely academic as there was no longer another action pending (*Diaz v Philip Morris Companies, Inc.*, 28 AD3d 703, 705 [2d Dept 2006]).

On or around June 6, 2024, the Appellate Division issued a Decision as to this appeal and, as relevant to MR's motion here, the plaintiff's motion for summary judgment was denied in its entirety with the First Department finding there were issues of fact as to the amount MR owed under the promissory note and as to whether the plaintiff's fraud and quasi-contract claims were duplicative of her contract claim (see *Gaughan v Russo*, 228 AD3d 428 [1st Dept 2024]). Additionally, the matter was remanded for further proceedings in accordance with the Appellate Court's Decision, including to address the plaintiff's claims of unjust enrichment and intentional infliction of emotional distress (*Id.*).

Therefore, although the First Department's Decision post-dates the submission date of the motion in the New Action, judicial notice of this Decision may be taken and as of the date of drafting of the present Decision and Order, the claims in the Prior Action remain active (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 8 [1st Dept 2007]). Additionally, the Appellate Court's findings in reversing and remanding directly affect the plaintiff's claims and issues raised herein, presenting an impediment to proceeding in the New Action (*Zanani v Sutton Apartments Corp.*, 193 AD3d 536 [1st Dept 2021]). Considering, if "permitted to proceed, identical parties would be litigating identical claims" based on the same overlapping allegations, in front of two different Judges, presenting a risk of inconsistent judgments (*Alvarez & Marshal Valuation Services, LLC v Solar Eclipse Inv. Fund III, LLC*, 216 AD3d 447, 448 [1st Dept 2023]).

As the plaintiff's claims against MR may be fully litigated and addressed in the Prior Action (*JPMorgan Chase Bank, N.A. v Luxama*, 172 AD3d 1341, 1342 [2d Dept 2019]), there is no good reason for the claims on a closely related theory to those in the Prior Action to proceed separately in the New Action (*Shah v RBC Capital Markets LLC*, 115 AD3d 444, 445 [1st Dept 2014]). Accordingly, in light of the reinstatement and/or remand of many of the plaintiff's causes of action in the Prior Action (*Stewart Tit. Ins. Co. v Wingate, Kearney & Cullen*, 145 AD3d 462, 462 [1st Dept 2016]), dismissal of the New Action is warranted to avoid duplicative litigation (*IRX Therapeutics, Inc. v Landry*, 150 AD3d 446 [1st Dept 2017]). As to defendant MR's alternative request for consolidation or joinder of the New and Prior Actions, the request is denied as moot in light of the above.

Accordingly, Motion Sequence 1, defendant MR's motion to dismiss, is GRANTED IN PART and to the limited extent that the complaint and New Action may be dismissed as against MR due to the Prior Action pending between the parties and is otherwise DENIED.

Motion Sequence 002: Defendant Sal Monaco's Motion to Dismiss

In Motion Sequence 002, defendant SM moves for an order, pursuant to CPLR §§ 3211(a)(5) and (7), dismissing the complaint in its entirety, asserting that the claims are barred by res judicata, the applicable statute of limitations, or the allegations fail to state a cause of action. The motion to dismiss is granted for the reasons set forth below.

Plaintiff attempts to assert multiple claims against SM in the New Action, including, those for: fraud, aiding and abetting conversion and fraud, unjust enrichment, misapplication of funds, interference, falsity, and breach of fiduciary duty. However, both the complaint and the New Action must be dismissed against SM, as they are barred by the doctrine of res judicata. Conceptually, “res judicata” is an umbrella term encompassing both claim preclusion and issue preclusion, which are described as two separate aspects of an overarching doctrine (*Rojas v Romanoff*, 186 AD3d 103, 107 [1st Dept 2020]). “Res judicata, or claim preclusion, precludes a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties, involving the same subject matter” (*Martinez v JRL Food Corp.*, 194 AD3d 488 [1st Dept 2021]). “Under New York’s transactional approach to the rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred” (*Josey v Goord*, 9 NY3d 386, 389-90 [2007] [internal quotations omitted]).

The claims in the New Action are between the same parties and involve the same subject matter as those in the Prior Action, and the claims against SM in the Prior Action were brought to a final conclusion (see NYSCEF Doc. No. 46). More specifically, on or around December 23, 2019, SM and Signature Bank filed a joint motion to dismiss the complaint in the Prior Action. In the Decision and Order, issued by Hon. Anthony Cannataro and dated November 30, 2020, the defendants’ motion to dismiss was granted, the plaintiff’s complaint was dismissed in its entirety as against Signature Bank and SM and judgment was entered in defendants’ favor (NYSCEF Doc. No. 48; 49). Thereafter, plaintiff filed a Notice of Appeal to appeal the Decision and Order granting dismissal, but Signature Bank and SM assert that following multiple extensions of the deadline to perfect by the First Department, plaintiff failed to perfect the appeal as to them by the final extension date (see NYSCEF Doc. No. 50). Plaintiff emphasizes that the dismissal did not explicitly state “with prejudice” and therefore left the door open for reconsideration or amendment. However, while this dismissal did not explicitly state “with prejudice”, the fact that a final judgment was entered and the plaintiff failed to perfect her appeal implies a final adjudication on the merits for res judicata purposes (see *Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 98 [1st Dept 2012]). Therefore, as there was an earlier, valid final judgment on the merits on the claims between plaintiff and SM in the Prior Action the plaintiff’s claims against SM in the New Action are barred (*Simmons v Trans Express Inc.*, 37 NY3d 107, 111 [2021]).

In opposition, plaintiff argues that res judicata does not apply because there are new facts about SM’s involvement that were not known at the time the Prior Action was filed or that have not yet been adjudicated on the merits in the Prior Action. However, “the claim preclusion rule extends beyond attempts to relitigate identical claims” (*Simmons v Trans Express Inc.*, 37 NY3d 107, 111 [2021]), the doctrine of res judicata

applies even if the later claim is based on a different theory or seeks a different remedy, so long as it arises out of the same transaction (*Martinez v JRL Food Corp.*, 194 AD3d 488 [1st Dept 2021]). Under the doctrine, “a claim will be barred by the prior adjudication of a different claim arising out of the same factual grouping even if the claims involve materially different elements of proof” (*Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 293 [1st Dept 2005] [internal quotations omitted], *c.f. Martinez v JRL Food Corp.*, 194 AD3d 488, 489 [1st Dept 2021] [new action not barred by res judicata when the issues involved in the prior actions compared to the instant action concerned different factual predicates]).

As the plaintiff’s claims against SM in the New Action are substantively the same or are premised on the same underlying transactions or occurrences as those alleged in the Prior Action, they are barred by res judicata (*Shaoul v Komolov*, 224 AD3d 618, 619 [1st Dept 2024]). Even if the plaintiff’s claims in the New Action were premised on a different theory or sought a different remedy, these claims are precluded by the entry of judgment and failure to perfect her appeal in the Prior Action (*see In re Hunter*, 4 NY3d 260, 269 [2005] [a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again as res judicata is designed to provide finality in the resolution of disputes]). Considering the above-mentioned and the additional points raised by the parties in the motion papers, the Court finds that any claims the plaintiff had against SM were fully resolved in the Prior Action for purposes of res judicata.

Defendant Sal Monaco's Motion to Dismiss (Motion Sequence 002) is GRANTED.

Motion Sequence 003: Defendants Irene Russo and Jacqueline Delaney's Motion to Dismiss:

In Motion Sequence 003, defendants IR and JD move to dismiss the complaint, pursuant to CPLR §§ 3211(a)(4), (a)(5), and (a)(7), alleging there is another action pending between the same parties for the same causes of action, the claims are barred by res judicata, the statute of limitations, and/or the allegations fail to state a cause of action or satisfy the requirements of CPLR §§ 3013 and 3014. Additionally, IR and JD are seeking legal fees and sanctions against the plaintiff for frivolous conduct.

More specifically, defendants contend that the complaint and/or New Action must be dismissed as against IR because the claims are barred by res judicata and for a lack of privity. Defendants also assert that the complaint and/or New Action must be dismissed as against JD, contending that the failure to state a cause of action, res judicata, forum shopping, and the statute of limitations are sufficient grounds to do so. The motion is granted in part for the reasons set forth below and otherwise denied.

CPLR § 3211(a)(5): Res Judicata as against IR:

Most of defendant IR’s motion to dismiss is premised on the contention that the New Action and the plaintiff’s claims are barred by res judicata. The doctrine of “res judicata” is collectively comprised of two related but distinct concepts: issue preclusion and claim preclusion (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). While not entirely clear from the motion papers, IR seems to assert that dismissal is warranted on both issue and claim preclusion grounds- alleging that IR was

dismissed from the underlying matter (*i.e.* the Prior Action) and the issue of privity was previously decided by the findings of both the Supreme Court and the Appellate Division. However, contrary to IR's assertions, neither *res judicata* nor collateral estoppel would apply to bar the plaintiff's claims or the New Action.

Often referred to as "*res judicata*", claim preclusion is the primary aspect of the doctrine and acts only as a bar to additional actions between the same parties on the same claims based upon the same harm (*Rojas v Romanoff*, 186 AD3d 103, 107 [1st Dept 2020]). The doctrine is designed to provide finality in the resolution of disputes, so "once a claim is brought to a final conclusion", *res judicata* applies as a complete bar to all other claims between the same parties (*In re Hunter*, 4 NY3d 260, 269 [2005]; *Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 293 [1st Dept 2005]). Also known as collateral estoppel, issue preclusion bars the re-litigation of "an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment" (*Russell v New York Univ.*, 42 NY3d 377, 384 [2024] [internal citations omitted]). Accordingly, issue preclusion prohibits or prevents litigation of previously decided issues (*Rojas v Romanoff*, 186 AD3d 103, 108 [1st Dept 2020]).

The doctrine of *res judicata* requires the existence of a final judgment or conclusion in a previous proceeding, while collateral estoppel requires that the issue was clearly raised and necessarily decided (*Simmons v Trans Express Inc.*, 37 NY3d 107, 111 [2021]; *Gulf LNG Energy, LLC v Eni S.p.A.*, 232 AD3d 183, 191 [1st Dept 2024]). Considering, "[i]t is, of course, axiomatic that a party seeking to assert [*res judicata* or claim preclusion must show the existence of a prior judgment on the merits" (*Miller Mfg. Co., Inc. v Zeiler*, 45 NY2d 956, 958 [1978] [internal citations omitted]).

In support of dismissal on *res judicata*/collateral estoppel grounds, IR relies on the denial of the plaintiff's motion to amend the complaint to include claims against IR in the Prior Action, which was affirmed on appeal. More specifically, in the Decision and Order dated March 7, 2019, the Court in the Prior Action denied the plaintiff's motion without prejudice on grounds that the proposed amendment was palpably insufficient as there was no privity or relationship to create a duty (NYSCEF Doc. No. 29). On appeal, the First Department affirmed this denial without prejudice, agreeing with the lower Court's determination that the proposed claims were insufficient or inadequately pled (NYSCEF Doc. No. 29; 30).

Considering, the doctrine of *res judicata* would be inapplicable as this was not a final judgment or final conclusion on the claims against IR in the Prior Action. The merits of the plaintiff's claims were not decided and "a dismissal without prejudice lacks a necessary element of *res judicata*—by its terms such a judgment is not a final determination on the merits" (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]). Additionally, collateral estoppel would also be inapplicable on the issue of privity, as it was not fully litigated or necessarily decided in the Prior Action. The Court did not actually decide the issue of privity and the dismissal in the Prior Action was not on the proof but based on the sufficiency of the pleadings (*Weinberg v Kaminsky*, 166 AD3d 428, 429 [1st Dept 2018]; *Imprimis Inv'rs LLC v Insight Venture Mgt., Inc.*, 300 AD2d 109, 110 [1st Dept 2002]). "Preclusive effect will not be given if the particular issue ... was not actually litigated, squarely addressed and specifically decided,' such as

when there has been ‘a failure to place a matter in issue by proper pleading’” (*Dragons 516 Ltd. v Knights Genesis Inv. Ltd.*, 77 Misc 3d 1223[A] [Sup Ct 2023], quoting *Singleton Mgt., Inc. v Compere*, 243 AD2d 213, 217 [1st Dept 1998]). Accordingly, this portion of the motion must be denied.

CPLR § 3211(a)(4):

IR and JD also assert the New Action should be dismissed, pursuant to CPLR § 3211(a)(4), as the New Action is secondary to the Prior Action and plaintiff now has two lawsuits for the same action. IR and JD’s motion to dismiss the complaint and the New Action may be granted due to the restored status and pending motion in the Prior Action. However, for the reasons set forth below, dismissal of the complaint and/or the claims asserted in the New Action is without prejudice.

As CPLR § 3211(a)(4) permits a party to move for dismissal of a complaint where “there is another action pending between the same parties for the same cause of action in a court of any state”, one factor which may be considered in weighing dismissal is whether the other action is still pending (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 8 [1st Dept 2007]). It is not necessary for the parties or the causes of action to be identical to invoke CPLR § 3211(a)(4), where, as here, there is a substantial identity of the parties and many of the allegations overlap between the Prior Action and the New Action (*GMF 157 LP v Inspirit Dev. and Constr., LLC*, 235 AD3d 493, 494 [1st Dept 2025]; *JPMorgan Chase Bank, N.A. v Luxama*, 172 AD3d 1341, 1342 [2d Dept 2019] [a substantial identity of parties generally is present when at least one plaintiff and one defendant is common in each action]). This is because, “where another action is pending, a major concern, as a matter of comity, is to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction” (*White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 93 [1st Dept 1997]).

Between the two actions, the parties are the same and the subject matter of the two actions are related and sufficiently similar (*Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017]). As previously established under the analysis in Motion Sequence 001, at the time the New Action was commenced and at the time this motion was filed, three motions remained pending in the Prior Action, including the plaintiff’s second motion for leave to amend the complaint (Motion Sequence 011) and add IR and JD as defendants. Again, while the Court in the Prior Action had conducted oral argument on the motions on February 9, 2023, no written Decision and Order had been issued (NYSCEF Doc. No. 84; 90). Thereafter, on or around June 16, 2023, the Court issued a written Decision and Order for the motions, including the motion to amend, in the Prior Action- granting plaintiff summary judgment in part and denying the plaintiff’s motion to join defendants and amend the complaint “since summary judgment concludes this action, and plaintiff still may commence a separate timely action against nonparties” IR and JD (NYSCEF Doc. No. 193). Accordingly, for the period of time following the issuance of this Decision and Order, the Prior Action was disposed, and CPLR 3211(a)(4) would not preclude proceeding against IR and JD in the New Action (*Diaz v Philip Morris Companies, Inc.*, 28 AD3d 703, 705 [2d Dept 2006]).

However, as stated above, plaintiff then appealed this Decision to the First Department. On or around June 6, 2024, the Appellate Division issued a Decision, vacating the denial of plaintiff's motion to amend and remanded the motion for a determination of its merit (see *Gaughan v Russo*, 228 AD3d 428, 428 [1st Dept 2024]). The Appellate Term's reversal and remand in the Prior Action presents an impediment to proceeding against IR and JD in the New Action (*Zanani v Sutton Apartments Corp.*, 193 AD3d 536 [1st Dept 2021]), and the potential danger of conflicting rulings on the same claims in the two different actions. As previously stated, "[p]ursuant to CPLR 3211(a)(4), an action should be dismissed where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter" (*Finch Prop. Holdings I, LLP v Blumenfeld*, 234 AD3d 521, 523-24 [1st Dept 2025] [internal quotations omitted]). Therefore, as the plaintiff's motion to amend the complaint and add JD and IR as parties in the Prior Action has been remanded for a determination on the merits, dismissal of this action in favor of the Prior Action will avoid duplicative, vexatious litigation (*IRX Therapeutics, Inc. v Landry*, 150 AD3d 446, 446 [1st Dept 2017]). Considering the Court's broad discretion in determining whether to dismiss an action based the pendency of another action, the New Action should be dismissed against IR and JD for the matter to be determined by the Court in the Prior Action.

Additionally, the parties' request for costs and sanctions based on plaintiff's frivolous conduct in commencing the New Action is denied. Under 22 NYCRR § 130-1.1, a Court, in its discretion, may award to any party or attorney in any civil action costs or sanctions resulting from frivolous conduct. "Frivolous conduct" includes that which "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR § 130-1.1[c][2]). Contrary to the assertions of defendants and/or their counsel, the Court does not agree that commencing the New Action was frivolous, sanctionable, shows that plaintiff cares little of the Court system, or that the "only reason that can be surmised that this lawsuit was even begun was to try to harass annoy" (NYSCEF Doc. No. 28). Rather, it was not frivolous for the plaintiff to commence the New Action based on the Court in the Prior Action directing as much and/or recognizing the plaintiff's ability to do so (NYSCEF Doc. No. 84; 90).

Defendants Irene Russo and Jacqueline Delaney's to dismiss the complaint, Motion Sequence 003, is GRANTED IN PART, to the limited extent that the New Action may be dismissed under CPLR § 3211(a)(4) but is otherwise DENIED.

Motion Sequences 004 and 005: Plaintiff's Motions for Summary Judgment, Striking Comments, and Sanctions:

In Motion Sequences 004 and 005, plaintiff moves pursuant to CPLR § 3126(3), to strike comments and/or allegations, 22 NYCRR § 130.1-1, for sanctions as against IR, JD, and their counsel, Marc Ialenti, and CPLR § 3212, for summary judgment on the grounds that she has met her prima facie entitlement to judgment as a matter of law for fraud, fraudulent intent, conversion, unjust enrichment, and breach of written and oral contracts.

With regard to the plaintiff's motion seeking summary judgment as against MR, the motion must be denied. In her motion, plaintiff has moved for summary judgment on her claims of fraud, fraudulent intent, conversion, unjust enrichment and breach of written and oral contracts. However, in accordance with the First Department's recent Decision on appeal, the plaintiff's motion for summary judgment in the Prior Action was denied in its entirety. The Appellate Court found there were triable issues of fact as to the amount owed under the promissory note, whether the fraud and quasi-contract claims were duplicative of the breach of contract claims, and remanded the unjust enrichment claim to be determined on the merits (*Gaughan v Russo*, 228 AD3d 428, 428 [1st Dept 2024]). Following the First Department's reverse and remand for further determination by the Court in the Prior Action, the plaintiff's motion for summary judgment in the New Action is denied (*see generally* *AIG Fin. Products Corp. v Penncara Energy, LLC*, 83 AD3d 495, 495 [1st Dept 2011]; *White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 96 [1st Dept 1997] ["the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere"]). Therefore, although both the plaintiff and MR have submitted ample evidence in support of their positions, the Court declines to address the merits of the evidence or the arguments raised in the motions herein.

In her motion, plaintiff also seeks to strike Attorney Marc Ialenti's "defamatory and salacious comments" and impose sanctions against IR, JD, and Ialenti for frivolous, malicious, and deceitful conduct, including late filings, perjury, and offensive or unprofessional conduct. In opposition, defendants IR/JD and Ialenti contend the plaintiff's claims/allegations are "ramblings," "lies," fail to address relevant issues and/or contain offensive conduct or ridiculous rhetoric.

The portion of the motion seeking to strike, pursuant to CPLR § 3126, is denied as it is procedurally improper. CPLR § 3126, entitled "penalties for refusal to comply with order or to disclose", governs available penalties for abuses in the discovery process. Here, there is no showing that IR/JD or Ialenti willfully disobeyed or otherwise failed to comply with an order or directive issued by this Court relating to discovery or production thereof.

Additionally, to the extent sought under CPLR § 3024, the portion of the plaintiff's motion seeking to strike the answer of defendants IR and JD based on objectionable or inflammatory conduct and/or seeking to strike the comments and/or allegations made by defendants' attorney, Ialenti, must also be denied as procedurally improper. CPLR § 3024 governs motions to correct pleadings, providing that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading" (CPLR § 3024[b]). As defined by CPLR § 3011, pleadings consist of a complaint and an answer but, a copy of any writing attached to a pleading is a part thereof for all purposes (CPLR § 3014). Therefore, matter within the scope of CPLR § 3024(b) may include written documents annexed to or included within a pleading or references to such documents (*Pisula v R.C. Archdiocese of New York*, 201 AD3d 88, 96 [2d Dept 2021]).

Here, the plaintiff seeks to strike defendants' answer based on the alleged conduct or statements of the defendants' attorney. However, the striking of the entire pleading is not an available remedy under CPLR § 3024(b), the movant may only strike

that portion of the pleading that contains the unnecessarily scandalous and prejudicial matter (*Amtad LLC v Sosh Architects, P.A.* [Sup Ct, NY County 2025], citing *Rudzinski v Jonathan L. Glashow, MD, PC*, 55 Misc 3d 1215[A] [Sup Ct 2017]). Additionally, the subject comments plaintiff seeks to strike are not in the defendants' answer or related pleading documents but instead, occurred as part of the parties' email correspondence. Accordingly, the content that plaintiff complains about is in a non-pleading document and is therefore not subject to being struck (see *Wells Fargo Bank N.A. v Lawson Ho-Shing*, 168 AD3d 126, 135 [1st Dept 2019] [documents which are not pleadings are not subject to being struck under CPLR § 3024(b)]).

Considering that the claims in the New Action have been dismissed due to the pending litigation status of the Prior Action, and this Court has not reached a determination as to the merits of the parties' claims and factual allegations raised herein, it remains unclear whether the parties conduct in the New Action was "completely without merit in law", "undertaken primarily to delay... resolution of the litigation, or to harass or maliciously injure another" or "assert[] material factual statements that are false" (*Alissa E. v Michael M.*, 154 AD3d 526, 527 [1st Dept 2017]). Therefore, with regard to the portion of plaintiff's motion seeking to impose sanctions, the motion is denied as it cannot be determined under the circumstances that this would be an appropriate remedy.

Therefore, for the reasons set forth above Motion Sequences 004 and 005, the plaintiff's motions for summary judgment, to strike and for sanctions are DENIED.

Motion Sequences 006 and 007: Federal Deposit Insurance Corporation, as Receiver for Signature Bank's, Motion to Dismiss and to Substitute:

In Motion Sequence 006, FDIC-Receiver similarly moves to dismiss the complaint on the grounds that the plaintiff's claims are barred by the doctrine of res judicata, collateral estoppel, and for the failure to state a cause of action. The motion to dismiss is granted, and accordingly, FDIC-Receiver's motion for substitution, Motion Sequence 007, is rendered moot.

FDIC-Receiver asserts that the plaintiff's claims in this New Action are the same as those previously asserted against Signature Bank in the Prior Action. As addressed in further detail under Motion Sequence 002, Signature Bank and SM filed a joint motion to dismiss the claims asserted against them in the Prior Action. In accordance with the Decision and Order issued by Hon. Anthony Cannataro and dated November 30, 2020, this motion was granted, the claims were dismissed, and judgment was entered in favor of Signature Bank and SM (NYSCEF Doc. No. 48; 49). Additionally, despite multiple extensions of the perfection deadline by the Appellate Division, plaintiff failed to perfect her appeal for this Order of dismissal.

The Court adopts its' same rationale and analysis as applied and set forth for Motion Sequence 002 of this action. This dismissal was a final conclusion on the plaintiff's claims against Signature Bank in the Prior Action. As there was a final determination on the merits in the Prior Action, and the claims herein are between the same parties and involve the same subject matter, the causes of action asserted by the plaintiff in the New Action as against Signature Bank a/k/a FDIC-Receiver are barred by

res judicata. Similarly, the plaintiff's arguments in opposition to the present motion are unavailing for the same reasons as those discussed in detail earlier.

Therefore, FDIC-Receiver's motion to dismiss, Motion Sequence 006, is GRANTED and Motion Sequence 007 is DENIED as moot.

Conclusion:

Accordingly, it is hereby:

ORDERED that Motion Sequence 1, defendant Michael Joseph Russo's motion is GRANTED IN PART, to the extent that the complaint and the above-entitled action are dismissed due to another action pending, but is otherwise DENIED; and it is further

ORDERED that Motion Sequence 002, defendant Sal Monaco's motion is GRANTED, and the complaint and the above-entitled action are dismissed as against said defendant; and it is further

ORDERED that Motion Sequence 003, defendants Irene Russo and Jacqueline Delaney's motion is GRANTED IN PART, to the extent that the complaint and the above-entitled action are dismissed as against said defendants due to another action pending, but is otherwise DENIED; and it is further

ORDERED that Motion Sequences 004, plaintiff's motion to strike and for sanctions is DENIED; and it is further

ORDERED that Motion Sequence 005, the plaintiff's motion for summary judgment, to strike and for sanctions is DENIED; and it is further

ORDERED that Motion Sequence 006, Federal Deposit Insurance Corporation, in its capacity as Receiver for Signature Bank's motion to dismiss is GRANTED, and the complaint and the above-entitled action are dismissed as against said defendant; and it is further

ORDERED that Motion Sequence 007, Federal Deposit Insurance Corporation, in its capacity as Receiver for Signature Bank's motion to substitute is DENIED as moot.

The foregoing constitutes the Decision and Order of the Court.

Motion Sequence 001:

  
20250820123502401NYSCEF DOC#00600465A8FF159D462B05F80

<u>8/19/2025</u> DATE					<u>NICHOLAS W. MOYNE, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER			
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>	REFERENCE

Motion Sequence 002:

*Nicholas W. Moynes*  
20250820123503M01N2FC10C9BE6B49465A8FF139D462B05F80

<u>8/19/2025</u>				<u>NICHOLAS W. MOYNE, J.S.C.</u>	
DATE					
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

Motion Sequence 003:

*Nicholas W. Moynes*  
20250820123503M01N2FC10C9BE6B49465A8FF139D462B05F80

<u>8/19/2025</u>				<u>NICHOLAS W. MOYNE, J.S.C.</u>	
DATE					
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

Motion Sequence 004:

*Nicholas W. Moynes*  
20250820123503M01N2FC10C9BE6B49465A8FF139D462B05F80

<u>8/19/2025</u>				<u>NICHOLAS W. MOYNE, J.S.C.</u>	
DATE					
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

Motion Sequence 005:

*Nicholas W. Moynes*  
20250820123503M01N2FC10C9BE6B49465A8FF139D462B05F80

<u>8/19/2025</u>				<u>NICHOLAS W. MOYNE, J.S.C.</u>	
DATE					
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

Motion Sequence 006:

  
20250820123503M001N2FC10C9BE6B49465A8FF139D462B05F00

8/19/2025

DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

Motion Sequence 007:

  
20250820123503M001N2FC10C9BE6B49465A8FF139D462B05F00

8/19/2025

DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED   
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: