SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 5, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2912 First Hudson Capital, LLC, Petitioner-Respondent, Index 570040/06

-against-

Ron Seaborn, Respondent-Appellant.

William E. Leavitt, New York, for appellant.

Sperber, Denenberg & Kahan, P.C., New York (Steven B. Sperber of counsel), for respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about March 30, 2007, which affirmed a judgment of the Civil Court, New York County (Gerald Lebovits, J.), entered June 20, 2005, after a nonjury trial, awarding possession to petitioner in a summary holdover proceeding, and modified an order, same court and Judge, entered on or about July 29, 2005, denying respondent's motion to vacate the warrant of eviction and granting petitioner's cross motion for a hearing to determine the fair market use and occupancy of the premises since the date of termination, to the extent of denying the cross motion and remanding the matter for further proceedings to determine the amount of use and occupancy due to petitioner, limited to the amount charged for the premises by petitioner plus additional amounts received by respondent as a result of the illegal roommate arrangements, reversed, on the law, without costs, the Civil Court orders vacated, the petition denied and respondent's motion to vacate the warrant of eviction granted.

Since it became effective December 20, 2000, Rent Stabilization Code (RSC) (9 NYCRR) § 2525.7(b) makes it a violation to charge a roommate more than a proportional share of the rent. However, unlike RSC 2526.6(f), which permits an owner to terminate the tenancy of a tenant who charges his subtenant more than the legal regulated rent plus no more than 10 percent if the apartment is sublet fully furnished (*see* RSC 2526.6 [b]), RSC 2525.7(b) does not provide for termination of the lease. Prior to enactment of RSC 2525.7, it was the firm rule in this Department that "[t]here is no cause of action for rent profiteering with respect to a roommate" (*Handwerker v Ensley*, 261 AD2d 190, 191 [1999]). Such position was in accord with our holding in *520 E. 81st St. Assoc. v Roughton-Hester* (157 AD2d 199, 202 [1990]) that a landlord may not evict a tenant for "profiteering" with respect to the rent charged a roommate. In so ruling, this Court stated:

> "Unlike the section pertaining to sublets, the paragraph in which the Legislature introduced the Roommate Law stresses the need to permit such living arrangements to

> continue and does not mention the elimination of speculation and profiteering as a purpose underlying the enactment of the statute (*Seaview-Atlas Mfg. Co. v Fonville*, [NYLJ, Apr. 19, 1989, at 23, col 4], *supra*). We conclude that this omission was deliberate and decline to impose the restrictions against profiteering in sublet situations to living arrangements involving roommates (*see Sullivan v Brevard Assocs.*, 66 NY2d 489) . . . In sum, neither the lease nor any law governing rent-stabilized apartments permit a landlord to evict a tenant for earning a profit from the rent charged a roommate (*Schneller v Moed*, 128 Misc 2d 885)" (*id.* at 203-204).

Our reading of the statute and the underlying legislative intent could not have been clearer, and that decision is still good law and binding upon us under principles of stare decisis.

Nevertheless the dissent attempts to discount this Court's holding in *Roughton-Hester* on the ground that it was issued a decade before the enactment of RSC 2525.7 and "hardly provides a definitive answer as to whether the subsequently-enacted RSC 2525.7 supports an eviction remedy." However, a fundamental principle of statutory construction is that "[i]n arriving at the legislative intent, the language of an amendment may be construed in the light of previous decisions construing the original act, it being presumed that the Legislature had such judicial construction in mind when adopting the amendment" (McKinney's Cons. Laws of NY, Book 1, Statutes § 191, at 353-354). Nothing could make the legislative mandate clearer than when a court finds that a statute does not have an eviction provision and the

Legislature later amends that statute but still omits such a provision. While the Rent Stabilization Code was amended since our decision in *Roughton-Hester* to prohibit overcharging a roommate, our rationale in limiting evictions for overcharging a roommate to cases where there is specific regulatory authority for such a cause of action "is equally applicable here, if not more so" (*see Giachino Enters. L.P. v Inokuchi*, 7 Misc 3d 738, 742 [2005]). Moreover, the dissent's suggestion that we affirm the Appellate Term's application of "the rule it has developed through its own common-law jurisprudence since enactment of that provision," not only is legally unsupported, but defies logic in that neither the Appellate Term nor this Court may develop its own "common-law jurisprudence" in an area as thoroughly legislated and highly regulated as the rent stabilization laws in New York City by ignoring the plain language of a statute, its clear legislative intent, and binding case law precedent of this Court applying the statute.

Although this Court subsequently indicated that rent profiteering involving roommates might entitle a landlord to maintain a holdover proceeding against the stabilized tenant (*BLF Realty Corp. v Kasher*, 299 AD2d 87, 91 [2002], *lv dismissed* 100 NY3d 535 [2003], citing *RAM 1 LLC v Mazzola,* 2001 NY Slip Op 50073 [App Term, 1st Dept 2001]), as noted by the Appellate Term in *270 Riverside Dr., Inc. v Braun* (4 Misc 3d 77 [2004]), that case is both legally and factually distinguishable in that it addressed the interplay between the Loft Law and the Rent Stabilization Law as it concerned a tenant who subdivided and sublet his loft space.

Moreover, the Appellate Term for the Ninth and Tenth Judicial Districts has subsequently noted that "DHCR [the agency charged with enforcement of the Rent Stabilization Code] has taken the position that [section] 2505.8(b) [of the Emergency Tenant Protection Regulations] and its counterpart in the Rent Stabilization Code (9 NYCRR 2525.7(b)) were intended to vest a roommate with the right to file a complaint against the tenant and not to create a new cause of action for eviction (*see* Note, Regulating Roommate Relations: Protection or Attack Against New York City's Tenants, 10 Journal of Law and Policy, 539, 547, 585, n 36 [2002])" (*SBR Assoc. LLC v Diederich*, 2003 NY Slip Op 51057 [2003]).

While the 20-year tenant, who originally moved into commercial space and invested thousands of dollars in improvements in order to gain rent stabilized status, concededly advertised for roommates in the Village Voice and charged them more than their proportional share of the rent, this is not a case like *West 148 LLC v Yonke*, (11 Misc 3d 40 [2006], *lv denied* 2006 NY Slip Op 73839U [1st Dept 2006]), where the tenant rented a portion of the stabilized apartment at double the regulated rent to a series of guests or "roommates" and described the apartment, in both an Internet listing for "Affordable Hotels" and on her business card, as the "Chez Sylvie Bed and Breakfast" (*id.* at 41). It is closer to *54 Greene St. Realty Corp. v Shook* (8 AD3d 168 [2004], *lv denied* 4 NY3d 704 [2005]), where the tenant erroneously, but not unreasonably, believed that he was entitled to some compensation for the improvements he made to the former loft space. In any event, to the extent that those cases presuppose a cause of action for eviction by the landlord, they should not be followed.

All concur except Saxe and Gonzalez, JJ. who dissent in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting)

The question presented on this appeal is whether Rent Stabilization Code (9 NYCRR) § 2525.7(b), which prohibits a tenant in a rent-stabilized apartment from charging a roommate more than his or her proportionate share of the legal rent, permits a landlord to evict the tenant when a violation of this provision is established. I would affirm the holding of Appellate Term, First Department, which applied the rule it has developed through its own common law jurisprudence since enactment of that provision -- that the remedy of eviction is permitted where the evidence demonstrates intentional commercial profiteering from roommates by the tenant of record. That is precisely what happened here.

I further observe at the outset that the majority's discussion contains a fundamental inconsistency. On one hand, it supports its conclusion that eviction is improper here by equating respondent's conduct with the benign roommate overcharge in *54 Greene St. Realty Corp. v Shook* (8 AD3d 168 [2004], *lv denied* 4 NY3d 704 [2005]), and distinguishing it from the egregious commercial exploitation justifying the tenant's eviction for a violation of RSC 2525.7 in *West 148 LLC v Yonke* (11 Misc 3d 40 [App Term, 1st Dept 2006], *lv denied* 2006 NY Slip Op 73839[U] [1st Dept 2006]). On the other hand, the majority follows that discussion with the offhand comment that "[t]o the extent these cases presuppose a cause of action for eviction by the landlord, they should not be followed." This Court cannot properly direct that *Yonke* not be followed while *at the same time* using *Yonke* to determine whether the facts here are similar enough to render its holding applicable to the present case.

The provision of the Rent Stabilization Code applicable to overcharging roommates, 9 NYCRR 2525.7(b), was enacted in 2000. Unlike the section's counterpart regarding overcharging *subtenants*, 9 NYCRR 2525.6, which authorizes both an award of treble damages to the overcharged subtenant (RSC 2525.6[b]) and the termination of the lease of the prime tenant (RSC 2525.6[f]), the enactment regarding overcharging roommates contains no specific provision for how it may be enforced, or by whom.

Although RSC 2525.7 contains no enforcement provision, it cannot seriously be suggested that it was intended to stand merely as an empty prohibition with no means of enforcement. Since enactment of the provision, Appellate Term, First Department has considered the issue in several cases and has concluded that RSC 2525.7 supports a judgment of eviction in appropriate roommate-profiteering cases (*see e.g. Roxborough Apts. Corp. v Becker*, 11 Misc 3d 99 [App Term, 1st Dept 2006]; *West 148 LLC v Yonke*, 11 Misc 3d 40 [App Term, 1st Dept 2006], *supra; Ram I LLC v Mazzola*, 2001 NY Slip Op 50073[U] [App Term, 1st Dept 2001], *lv denied* 2002 NY App Div LEXIS 6531 [2002]).

Indeed, in two of those cases this Court has denied leave to appeal, which, although not a determination on the merits, indicates that we perceived no grave error in the rule enunciated in those cases (*see Matter of Marchant v Mead-Morrison Mfg. Co.*, 252 NY 284, 298 [1929]).

However, this Court has not directly ruled on the issue of whether RSC 2525.7 supports a judgment of eviction for roommate-profiteering. Our decision in *520 E. 81st St. Assoc. v Roughton-Hester* (157 AD2d 199 [1990]), was issued a decade before the enactment of RSC 2525.7, so our conclusion there, that a landlord may not evict a tenant for profiteering with respect to the rent charged to a roommate, while relevant to the interpretation of the statute, hardly provides a definitive answer as to whether the subsequently-enacted RSC 2525.7 supports an eviction remedy. Yet, the majority treats that 1990 decision, issued 10 years *before* enactment of the provision, as controlling, trotting out a worn and tired proposition from McKinney's Statutes, a compendium of aphorisms where even a casual researcher can find some support for nearly any proposition, however dubious, sought to be advanced.

In order to arrive at our own conclusion as to whether Appellate Term has correctly held that an eviction remedy may be read into RSC 2525.7, I therefore turn to consider rulings issued by this Court *since* enactment of the provision. Our ruling in

BLF Realty Holding Corp. v *Kasher* (299 AD2d 87, 91 [2002], *lv dismissed*, 100 NY2d 535 [2003]), is instructive, since we stated there that:

> "Rent Stabilization Code § 2525.7(b) also prohibits a stabilized tenant from charging a roommate in excess of the roommate's proportional share of the stabilized rent. *Rent profiteering in the latter circumstance may also entitle a landlord to maintain a holdover proceeding against the stabilized tenant*" (emphasis added).

Kasher did not concern the interpretation of RSC 2525.7(b), and the above statement therefore constitutes dicta. However, in addition, this Court's decision in *54 Greene St. Realty Corp.* v *Shook* (8 AD3d 168 [2004], *supra*), provides further, albeit indirect, support for the proposition that RSC 2525.7 authorizes eviction as an available remedy where roommates are overcharged and there is a finding of an intent to profiteer. While rejecting the remedy of eviction in that matter, we did so based on the nonegregious nature of the conduct; "the IAS court properly refused to eject the tenant and his roommate *since the amount of overcharge was small and there was no evidence of bad faith or an intent to profiteer*" (*54 Greene St. Realty Corp.*, 8 AD3d at 168 [emphasis added]). The holding implicitly acknowledges that eviction would be an available remedy in cases involving more egregious profiteering by the tenant. Notably, in *Kasher* we also cited with approval *Ram I LLC* v *Mazzola* (2001 NY Slip Op 50073[U] [2001], *supra*), in which Appellate Term, First

Department held that RSC 2525.7 supports a possessory cause of action for a roommate overcharge.

Finally, mention must be made of the majority's odd notion that a common-law court may not develop its own "'common-law jurisprudence' in an area as thoroughly legislated and highly regulated as the rent stabilization laws of New York City." Without belaboring this point, it is incorrect. Statutes are interpreted by common law courts in their decisions, becoming part of the body of our common law. "[C]odes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled" (Cardozo, The Nature of the Judicial Process 14 [1921]). The law of rent stabilization is no exception. Its provisions, its nuances, its silences and its legislative history, among other things, are and always will be subject to the scrutiny and interpretive powers of common law judges doing what they are empowered to do -- decide cases.

I add that there is a significant policy rationale for permitting eviction of a rent-stabilized tenant who profiteered from roommates. When a tenant sublets, the landlord is entitled to demand an array of information, including a copy of the sublease, whereas the landlord has no right to any such information with respect to a roommate beyond the name of the new occupant (Real Property Law § 235-f[5]). With so little oversight over roommate arrangements, the possibility of profiteering from roommates will be better kept in check where tenants have reason to know that forming such an arrangement in violation of the Rent Stabilization Code may result in the serious penalty of eviction rather than merely having to pay back rent overcharges.

I therefore reject the suggestion that eviction of tenants for overcharging roommates is never permitted because the regulation does not specifically authorize such a cause of action. Rather, I would adopt the rule stated by the Appellate Term, First Department, and implied in this Court's previously discussed cases: RSC 2525.7 must be read to permit a cause of action to evict a rent-stabilized tenant who overcharges roommates, where the overcharges have been found to constitute the commercial exploitation of the tenant's rent-stabilized apartment through the use of intentional profiteering.

I would further adopt the finding of the Civil Court and Appellate Term that respondent's conduct amounted to intentional profiteering, rising to the level of commercial exploitation of his rent-stabilized apartment. The conduct of respondent here, as found by the trial court, was not of the benign nature demonstrated in *54 Greene St. Realty v Shook* (8 AD3d 168 [2004], *lv denied* 4 NY3d 704 [2005], *supra*). It was far closer to that in *West 148 LLC v Yonke* (11 Misc 3d 40 [App Term, 1st Dept 2006], *supra*), which affirmed the eviction of the tenant of record where the tenant had rented a portion of her rent-stabilized apartment to a series of guests she termed "roommates," each of whom she charged nearly double the stabilized rent; the tenant had listed her apartment on the internet under "Affordable Hotels" and printed up business cards reading "Chez Sylvie Bed and Breakfast" (*id.* at 41), so the finding that she had commercially exploited her rent-stabilized apartment was well supported.

The present case parallels *Yonke* in many ways. Respondent sometimes collected rent virtually covering his entire stabilized rent, and sometimes, when he had two roommates simultaneously, he collected almost twice his stabilized rent. Moreover, respondent's credibility was seriously undermined by his testimony regarding the overcharge refund he purportedly paid to one roommate, Nigel Borel. Although respondent initially testified to having refunded Borel $1,350 by check on December 1, 2004, Borel then called that refund into question with his own testimony that respondent had instructed him that he would write Borel a check for $1,350, but that Borel would have to pay respondent cash in that amount, in order to make it appear that Borel had paid less rent than he actually did. Borel's bank statement showed a withdrawal of cash in the amount of $1,350 on December 9, 2004, which cash he testified he gave to respondent. Borel further testified that respondent set up this transaction after first indicating, in late November, that Borel would have to vacate the premises because the landlord was in the process of making a case against respondent. When respondent was subsequently recalled to the stand, he admitted that when he gave Borel that check, he asked for the same amount back in cash, but he explained that he needed a loan, and that Borel had agreed to the loan. Moreover, he said he refunded Borel the $1,350 by mailing him a check to his place of business on June 2, 2005.

The Civil Court's rejection of respondent's credibility, and its resultant rejection of his defense that his violation of the roommate overcharge provision was minor and unwitting, was well supported by the testimony, and Appellate Term's characterization of respondent's actions as commercial exploitation of his stabilized apartment was an accurate assessment, warranting the resulting judgment.

There is no question that in appropriate circumstances a tenant who overcharged roommates should be given an opportunity to cure the violation (*see Roxborough Apts. Corp. v Becker*, 11 Misc 3d at 100); however, I agree with the trial court's determination that even if respondent's violation was considered curable, he did not succeed in establishing any true intent to undertake such a cure in good faith. Rather, respondent's conduct was on the order of that established in *Yonke*, such as would clearly justify the ordered eviction. Accordingly, I dissent.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 5, 2008

CLERK

Tom, J.P., Andrias, Gonzalez, Nardelli, Sweeny, JJ.

3155 Dean Ross, Plaintiff-Appellant, Index 601814/01

-against-

Eric Nelson, et al., Defendants-Respondents.

Joseph C. Andruzzi, Plainview, for appellant.

Kudman Trachten Aloe LLP, New York (Michelle S. Babbitt of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered October 17, 2006, which denied plaintiff's motion for summary judgment, granted defendants' cross motion to dismiss the first, second, fifth, sixth, seventh, eighth, ninth, tenth and seventeenth causes of action, and declared that plaintiff was properly removed as a member-manager of the subject limited liability companies and not entitled to management fees, affirmed, without costs.

The operating agreement under which the parties worked was, by its terms, guided by the Limited Liability Company Law. Even though the agreement lacked a specific provision for removal of a member-manager, it clearly and unambiguously allowed for same by the language of Article VI, which called for the dissolution of the LLC and its reorganization upon, among other events, the "expulsion" of a member-manager. Lacking a specific mechanism in the operating agreement for such expulsion, the parties relied on

§ 414 of the Limited Liability Company Law, which allows for removal of a manager by majority vote of the other members.[1]

Furthermore, the pertinent provisions of the operating agreement unambiguously evidenced an intent to pay management fees to the entity in the appointment of Vintage as the managing agent at the inception of the companies, as well as the payment of the fee to Vintage for approximately five years. This reflected the parties' intention to pay the entire management fee to the managing agent (*see Empire Mut. Ins. Co. v Applied Sys. Dev. Corp.*, 121 AD2d 956, 960 [1986]).

We have considered plaintiff's remaining contentions and find them unavailing.

All concur except Andrias and Nardelli, JJ.
who dissent in part in a memorandum by
Andrias, J. as follows:

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[1]The dissent's argument that Article III controls would compel us to view that Article in a vacuum, dismissing the significance, if not the actual presence, of Article VI and thereby ignoring the need to read the agreement as a whole.

ANDRIAS, J. (dissenting in part)

I agree that pursuant to the unambiguous terms of the operating agreement, and in light of the conduct of the member-managers since the inception of the companies, the member managers intended to pay the entire management fee to Vintage, the duly appointed managing agent. However, I would modify the order appealed from to the extent of granting plaintiff partial summary judgment declaring that he is and remains a member manager of 442-44 Third Ave. Realty, LLC and Chelsea Village Realty LLC, and denying defendants' motion to the extent it seeks dismissal of plaintiff's second cause of action for breach of the operating agreements.

Limited Liability Company Law § 414 provides for the removal or replacement of any or all managers with or without cause by a vote of a majority in interest of the members entitled to vote thereon, "[e]xcept as provided in the operating agreement." Although the operating agreements in issue do not have a specific expulsion provision, Article III (MEMBERS/MANAGERS) of both agreements sets forth the companies' ownership and management structure and provides, in paragraph 7, that "Eric Nelson, Gary Podell and Dean Ross have been elected member managers and shall continue to serve as member managers in accordance with the provisions of this Agreement. In case of any vote for the election of managers all members agree to vote for Eric Nelson, Gary Podell and Dean Ross only." There is no claim of fraud or mistake in the wording or adoption of the operating agreements, and "[a]bsent some indicia of fraud or other circumstance warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck" (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Thus, regardless of the provision in paragraph 1 of Article VI (DISSOLUTION) that the companies would be dissolved upon, inter alia, the "bankruptcy, death, expulsion, incapacity or withdrawal of any manager," since the members were obliged to vote for the three named persons in "any" election of managers, their vote to expel plaintiff from both companies and replace him with his brother was contrary to the plain and unambiguous language of the agreements. Therefore, plaintiff is entitled to a declaration that his removal from office was invalid, and to reinstatement of his second cause of action for breach of the operating agreements.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 5, 2008

CLERK

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3364 Howard Fishkin, et al., Index 600989/02
Plaintiffs-Appellants,

-against-

Bert Taras, et al.,
Defendants-Respondents.

Kenneth J. Gorman, New York, for appellants.

Anthony J. Cugini, Jr., New York, for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 5, 2006, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiffs' first, second, third, seventh and ninth causes of action, and denied plaintiffs' cross motion to compel discovery, unanimously modified, on the law, the facts, and in the exercise of discretion, the motion denied with respect to the first cause of action and the matter remanded for further proceedings thereon, and otherwise affirmed, without costs.

With one exception, the motion court properly granted defendants summary judgment to the extent indicated in this fee dispute between attorneys, where plaintiffs failed to file retainer statements in compliance with Rules of the Appellate Division, First Department (22 NYCRR) § 603.7(a)(3), "a prerequisite to receipt of compensation for legal services" (*Rabinowitz v Cousins*, 219 AD2d 487, 488 [1995]). Plaintiffs' belated filing of several of the subject retainer statements was insufficient to preserve their right to recover legal fees. Indeed, the record shows that these statements were only filed in response to defendants' motion for summary judgment and plaintiffs did not seek permission to file the statements nunc pro tunc. Nor did plaintiffs offer a reasonable excuse for their failure to timely file (*compare Matter of Abreu*, 168 Misc 2d 229, 234 [1996]).

However, with respect to the first cause of action relating to the Brooks case, the record indisputably shows that plaintiff Fishkin filed a retainer statement on October 31, 1994, which was 18 months after he was retained, but only seven days after defendants belatedly filed their own retainer statement in the same matter. While the motion court may have been confused by Fishkin's later nunc pro tunc filing of an *amended* retainer statement in June 2006, we find that, taken together, Fishkin's initial 1994 filing and his 2006 nunc pro tunc filing create a triable issue as to whether there was sufficient compliance with 22 NYCRR 603.7(a)(3) to permit this action to proceed.

We have considered plaintiffs' remaining arguments and find them unavailing.

M-1489 - *Fishkin, et al. v Taras, et al.*

Motion seeking leave to enlarge the record granted.

The Decision and Order of this Court entered herein on April 10, 2008 is hereby recalled and vacated (*see* M–2388 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 5, 2008

CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3677 Miguel Tirado, Index 18608/05
Plaintiff-Appellant,

-against-

Elrac Inc., etc., et al.,
Defendants,

U-Haul Co., Inc.,
Defendant-Respondent.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Bryan Cave LLP, New York (Daniel P. Waxman of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered December 7, 2006, which granted the motion of defendant U-Haul Company of New York and Vermont (incorrectly sued herein as U-Haul Co., Inc.) for summary judgment dismissing the complaint as against it, and denied plaintiff's cross motion to amend the complaint, unanimously reversed, on the law, without costs, the motion denied and the cross motion granted.

Plaintiff alleges that on November 9, 2004, while a passenger in a car driven by defendant Litzey and owned by defendant Elrac, he sustained injuries when their vehicle was struck by a truck owned by U-Haul Co., Inc. (UHI) and operated by defendant McFarlan. The truck in question bore Arizona registration number AB24019 and was apparently owned by U-Haul Co. of Arizona (UHAZ).

On July 29, 2005, plaintiff filed a verified complaint, naming Elrac, Litzey and McFarlan as defendants. Believing that the rental truck was owned by UHI, plaintiff sued that entity, claiming vicarious liability for the negligent use or operation of the vehicle. UHI was served on August 26, 2005, by service on the New York Secretary of State, and an additional copy was mailed to UHI at 2727 N. Central Ave., Phoenix, Arizona. On October 7, 2005, U-Haul Co. of New York (UHNY) filed an answer in lieu of UHI, presuming it was the intended defendant.

On August 10, 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act (49 USC § 30106), commonly referred to as the "Graves Amendment." The pertinent provision of this legislation prohibits the imposition of vicarious liability on vehicle lessors for injuries resulting from the negligent use or operation of the leased vehicle, and applies to "any action *commenced* on or after the date of enactment of this section" (49 USC § 30106[c], emphasis added).

On February 6, 2006, UHNY moved for summary judgment dismissing the complaint on the ground that UHAZ, not UHNY, owned the truck, and that UHI was an inactive New York corporation that did not, on November 9, 2004, operate any rental outlets in this state. UHNY also argued that any attempt by plaintiff to amend the complaint to add UHAZ should be denied because the amended action would be commenced subsequent to the effective date of the

Graves Amendment.

Plaintiff, while admitting that the wrong company had been sued, cross moved to amend the complaint pursuant to CPLR 3025(b) to add UHAZ, arguing that under CPLR 203(a), such amendment should "relate back" to the original commencement date of the action, which preceded the effective date of the Graves Amendment. Plaintiff argued that a claim against UHAZ would be based on the same occurrence as the claim against UHNY, and UHAZ was "united in interest" with UHNY.

The IAS court granted UHNY's motion to dismiss the complaint because it was undisputed that UHNY did not own the truck. The court denied plaintiff's cross motion to amend the summons and complaint to add UHAZ, the actual owner of the truck, rejecting plaintiff's attempt to relate the proposed claims back against UHAZ. Additionally, the court found that "liability of the proposed defendant has been cut off" by the enactment of the Graves Amendment.

The Court of Appeals has recently addressed the issue of when an action is "commenced" for the purpose of applying the preemption provisions of the Graves Amendment. Pursuant to CPLR 304, an action is "commenced" by filing a summons and complaint or summons with notice. "Thus, under the statute's plain language, any action filed prior to August 10, 2005 has been 'commenced' and therefore removed from the federal statute's pre-emptive reach" (*Jones v Bill*, 10 NY3d 550, 2008 NY LEXIS 1474, *4, 2008 WL 2276211, *3). In addressing the very situation that this case presents, the Court discussed New York's statutory scheme regarding interposition of claims against a "defendant or a co-defendant united in interest" (CPLR 203[c]), and the requirement that joinder of additional parties and interposition of claims against those parties must occur within the context of an existing action, holding that "[n]othing in the language of the Graves Amendment suggests that it bars vicarious claims asserted in an amended pleading in an action commenced prior to its effective date" (10 NY3d at __, 2008 NY LEXIS 1474 at *5-6, 2008 WL 2276211 at *3).

Therefore, since the action herein was commenced 12 days prior to the effective date of the Graves Amendment, it was removed from the pre-emptive reach of the statute, and plaintiff's motion should have been granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 5, 2008

CLERK

AUG 5 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
John T. Buckley
James M. Catterson
Rolando T. Acosta, JJ.

3411-
3411A
Index 600490/05

_______________________________________x

MHR Capital Partners LP, et al.,
Plaintiffs-Appellants,

-against-

Presstek, Inc.,
Defendant-Respondent,

Silver Acquisitions Corp., etc.,
Defendant.

_______________________________________x

Plaintiffs appeal from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered July 26, 2007, which granted defendant Presstek's motion for summary judgment dismissing the complaint as against it, and from a judgment, same court and Justice, entered thereon on August 3, 2007.

Kasowitz, Benson, Torres & Friedman LLP, New York (Michael P. Bowen, Michael M. Fay, David S. Rosner and Kim Conroy of counsel), for appellants.

Hartman & Craven LLP, New York (Victor M. Metsch and Colleen D. Dalton of counsel), for respondent.

BUCKLEY, J.

In 2003, defendant Presstek and its wholly owned subsidiary, defendant Silver Acquisitions Corp. (Silver), began to explore the possibility of purchasing A.B. Dick Company (ABD) from its parent, Paragon Corporate Holdings, Inc. (Paragon). Those entities negotiated a Stock Purchase Agreement, which incorporated ancillary agreements, including one whereby plaintiffs, MHR Capital Partners LP and its affiliates (collectively, MHR), major creditors of ABD, waived rights they held under ABD notes in return for payment of cash and Presstek stock.

On June 16, 2004, Presstek, Silver, ABD, Paragon, and MHR executed an Escrow Agreement, pursuant to which the Stock Purchase Agreement was deposited in escrow, to be released upon the satisfaction of certain conditions by specified dates; if the conditions were not met by their expiration dates, then the escrowed documents were to be destroyed. Among the express conditions was the requirement that Key Corporate Capital, Inc. (Key Bank), ABD's lender, sign the consent form attached to the Escrow Agreement by the close of business on June 22, 2004. A "WHEREAS" clause recited that the parties had agreed to hold the documents in escrow for a "four (4) day period (the 'Key Escrow Period') to obtain the consent of Key . . . to the Proposed

Transaction." Another "WHEREAS" clause stated that the parties had "agreed that the escrow provided for hereunder shall in no event be released unless and until Key consents to the transaction on the terms and conditions contained herein."

Section 3(b) of the Escrow Agreement provided:

> "From the date hereof through the close of business on June 22, 2004, [Paragon] shall endeavor to obtain Key's consent and agreement to the Proposed Transaction, such consent and agreement to be evidenced by Key's execution of [the Consent and Agreement] attached hereto."

Section 4(b) stated:

> "On or prior to the expiration of the Key Escrow Period, if Key shall have consented to the transaction <u>and executed the Consent and Agreement in accordance with Section 3(b) above</u>, then, subject to the completion of 3(a) above [outlining other requirements], the parties hereby agree that the Escrow Deposit shall be released from any condition relating to obtaining Key's consent" (emphasis added).

Section 4(c) continued:

> "Upon the earlier of (i) the failure of the occurrence of the items set forth in Section 4(a) or 4(b) above . . . or (iii) the expiration of the Key Escrow Period without receiving the consent and agreement of Key, [Presstek] shall . . . destroy all of the [escrowed documents]."

Finally, section 7 set forth:

> "This Escrow Agreement may not be altered or modified without the express prior written

> consent of the Parties hereto. No course of conduct shall constitute a waiver of any terms or conditions of this Escrow Agreement, unless such waiver is specified in writing, and then only to the extent so specified."

It is uncontested that Key Bank did not execute the consent form by the close of business on June 22, 2004. Moreover, it is uncontroverted that Key Bank never signed the consent form. In fact, a Key Bank senior vice president, Michael Lugli, testified at his deposition that Key Bank "would not sign it" because the bank "would not accept" certain of the conditions set forth in the consent form. Among the provisions that Key Bank objected to were that it provide unlimited funding to ABD through the closing of the sale (section 3[a] of the consent form), forbear from declaring any loan default until the closing of the sale (section 3[b] of the consent form), and accept payment in the form of cash and Presstek stock (section 2[a] of the consent form) rather than only cash. Fundamentally, Key Bank was "not willing to undertake the risk" of "an unconditional commitment to fund" ABD.
Key Bank was willing to agree to a more limited commitment, and by letter dated June 22, 2004, signed by Lugli, agreed to lend up to $26 million "between now and the closing of the transaction . . . on or about July 16, 2004."

As the foregoing makes clear, there is no question that Key Bank did not sign the consent form, by the cutoff date or ever, and that Key Bank refused to agree to several substantive provisions of the consent form. Thus, by the terms of the Escrow Agreement, Presstek was relieved of any obligation to proceed to closing under the Stock Purchase Agreement.

MHR's assertion that Key Bank's signing of the consent form was not a condition precedent to the release of the Stock Purchase Agreement from escrow is belied by the plain language of the Escrow Agreement. Insofar as MHR contends that Key Bank's signature was a mere formality, Lugli confirmed at his deposition that the bank objected to the substance of certain requirements contained in the consent form. With respect to MHR's argument that the consent form was poorly worded or created conditions additional to those set forth in the Escrow Agreement or Stock Purchase Agreement, it should have voiced those concerns at the time the documents were drafted and agreed to by the parties. While MHR faults Presstek for not using more strenuous efforts to convince Key Bank to agree to the consent form, the Escrow Agreement placed that duty on Paragon.

Because there are no factual issues concerning the termination of the parties' agreements, summary judgment was properly granted to Presstek. Inasmuch as we are affirming the dismissal of the action, we need not discuss the alternative grounds for dismissal invoked by Presstek.

Accordingly, the judgment of the Supreme Court, New York County (Richard B. Lowe III, J.), entered August 3, 2007, dismissing the complaint as against defendant Presstek, should be affirmed, without costs. The appeal from the order, same court and Justice, entered July 26, 2007, which granted Presstek's motion for summary judgment, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Catterson and Acosta, JJ. who dissent in part in an Opinion by Acosta, J.

ACOSTA, J. (dissenting in part)

In my opinion, there are material issues of fact related to Presstek's conduct indicating that it attempted to frustrate or prevent the signing of the consent form.

Plaintiffs (MHR) allege that defendant Presstek breached its obligations under a June 16, 2004 Escrow Agreement and Stock Purchase Agreement of the same date to purchase the equity of a now-bankrupt graphic arts and printing supplier known as A.B. Dick Company (ABD) from its parent, Paragon Corporate Holdings. MHR was a significant creditor of ABD, once holding over $18 million in notes issued to ABD, which stood to have some of its debt cleared as an expressed beneficiary pursuant to the Stock Purchase Agreement.

Presstek and defendant Silver Acquisitions were involved in the graphic arts and imaging industries.[1] In 2004, Presstek and Silver were interested in purchasing ABD and proposed an agreement by which one or more of the MHR entities would receive fees and other reimbursements. Specifically, pursuant to the Distribution Agreement, incorporated into the Stock Purchase Agreement, MHR agreed to waive rights it held under its ABD notes and terminate the obligations owed to MHR by ABD and Paragon

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1 The complaint against Silver was dismissed for lack of personal jurisdiction.

under the notes. In return, Presstek agreed to payments of cash and Presstek stock to MHR.

ABD, Paragon, MHR, Presstek and Silver entered into an Escrow Agreement, pursuant to which the parties deposited in escrow the Stock Purchase Agreement. Certain specified conditions were set forth for the release of the Stock Purchase Agreement, including the express requirement that Key Bank sign a consent to the transaction in a form annexed to the Escrow Agreement. The Escrow Agreement further provided that Key Bank's consent, evidenced by execution of the form annexed thereto, was required by the close of business on June 22, 2004, and if such consent was not received by the close of the expiration period, the escrowed documents were to be destroyed.

According to Michael V. Lugli, a Senior Vice President of Key Bank, he met with Presstek's representatives on June 17, 2004, one day after the escrowing of the Stock Purchase Agreement. Presstek had asked for the meeting, and ABD and Paragon "greatly encouraged" Key Bank to meet with Presstek. During the meeting, Presstek requested that Key Bank continue to provide funding to ABD for 30 days so that a closing could occur on the Stock Purchase Agreement. Lugli testified at his deposition that Presstek never mentioned the Consent Agreement nor told Lugli that it had to be signed by Key Bank during the meeting.

Although Key Bank initially declined to provide the requested funding at the June 17th meeting, on June 22, in response to a letter faxed from Presstek at 4:00 p.m. that day, Key Bank faxed back its agreement to do so later that afternoon, at 5:10 p.m. It should be noted that Presstek's letter to Key Bank did not specifically mention the Consent Agreement. Rather, it mentioned "relevant documents," Presstek's inability to proceed with the transaction without Key Bank's funding, and its conclusion that Key Bank had denied approval of the proposed transaction.

In its response to Presstek, Key Bank stated

> [*Key Bank*] *hereby consents*, on behalf of itself as Agent, LC Issuer and as the sole Bank under its Credit and Security Agreement with Paragon Corporate Holdings, Inc., *to the Proposed Transaction pursuant to the terms that have been outlined to* [Key Bank]. Specifically, [Key Bank] understands that (a) the limited open due diligence conditions will have been satisfied on or before June 28th 2004, (b) Platinum will consent to any increase in the outstandings under [Key Bank] facility (up to $26,000,000) between now and the closing of the transaction, and (c) that there will be no other impediment to a closing on or about July 16, 2004 (emphasis added).

The letter was signed by Lugli on behalf of Key Bank.

That same evening, Presstek terminated the transaction by email because of Key Bank's failure to sign the Consent Agreement. Lugli wrote to Presstek on June 25, 2004, stating that "Contrary to the analysis and the conclusions set forth in the June 22 Email, we believe that Presstek has repudiated its obligations with respect to the Proposed Transaction. The June 22 Email makes it clear that, notwithstanding our consent and the provisions of the Escrow Agreement and the Principal Documents, Presstek has no intention of proceeding with the Proposed Transaction. Presstek's actions since June 22 serve only to confirm the view - we understand that Presstek . . . is attempting to negotiate with Paragon a new agreement for the purchase of [ABD] assets with a revised structure and a greatly reduced purchase price."

In fact, just one day after Presstek's termination of the Escrow and Stock Purchase Agreement, Presstek had drafted a term sheet for a significantly cheaper purchase of ABD's assets. According to plaintiff's statement of additional material facts, Presstek's CEO informed Presstek's board, one week after the termination, that the new Asset Purchase Agreement was structured so that "[m]any liabilities are 'left behind'" (including Presstek's obligations to MHR), and that the "new transaction is about $40 million less than the previous transaction."

Given ABD's dire financial condition, it went along with the

Asset Purchase Agreement, and as required, filed for bankruptcy on July 13, 2004 in the District of Delaware. ABD and Paragon applied to the Bankruptcy Court for an order authorizing the sale of substantially all of ABD's assets to Silver and Presstek pursuant to a so-called "stalking horse auction" wherein third parties were invited to top their purchase proposal. On August 9, 2004, the MHR entities filed objections to the auction sale of ABD's assets on the ground that, inter alia, Silver and Presstek were not "good faith purchaser[s]" within the meaning of 11 USC § 363. Following document production, deposition and written submissions, an evidentiary hearing was held on MHR's objections. During closing arguments, counsel for MHR argued that MHR opposed the sale because Presstek could not establish it had acted "in good faith and that means without fraud, without evidence of collusion, without taking unfair advantage of bidders, and with integrity and honesty of purpose." Counsel went on to discuss MHR's breach of contract claim against Presstek in the context of its argument that Presstek failed to act in good faith within the meaning of 11 USC § 363.

In response, the court stated, "Well, what if I - in order of approving the sale, what if I assign that claim to [MHR] and let you proceed against Presstek?" MHR, through counsel, accepted the court's offer.

Counsel for Presstek argued that Presstek had acted in good faith within the meaning of 11 USC § 363 because the auction itself was fair. With respect to MHR's breach of contract claim, Presstek noted for the record:

> "*I heard MHR's counsel say, not for the first time, they're going to sue my client. That's never happy news for a client, but we understand that and we're prepared to take that fight on as and when we get there. But that's not the issue here today. The issue for today is not the alleged wrongful termination. You don't have a record on that. Your issue today is whether to approve this asset Purchase agreement.* And here the evidence is quite clear and, again, despite the attempts to muddy the record, the evidence was uncontrovert[ed]. There was a full and fair auction and no other bidders showed up. . . . There is absolutely nothing that suggests bad faith in the conduct of this auction (emphasis added).
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> * * *
>
> "It is our contention, of course, that my client did nothing whatsoever improper about the termination. But that's not really the issue. The issue respectfully is whether there's a business purpose here, and we believe the record of the Debtor's continuing losses and the fact that there is no realistic alternative here, fully supports the Debtor's business judgment that a sale of their assets is the only realistic answer here."

In discussing the draft order that the Bankruptcy Court would issue after the hearing, the court stated, "you better put a provision in there . . . [about the] proposed litigation against Presstek for a violation, or what they allege to be a cause of action for violating the Stock Purchase Agreement, will be assigned to MHR." Presstek, however, objected to the Bankruptcy Court assigning the breach of contract claim to MHR, arguing that it was "part of the bargain for [*sic*] consideration that we have from the estate." The court noted that Presstek had earlier suggested it would defend itself against SPA-related claims.

Ultimately, the Bankruptcy Court did not make any findings regarding the merits of MHR's claim against Presstek for termination of the Stock Purchase Agreement. Instead, the court directed the parties to negotiate an order for the court's signature. The order did not address any issues related to the Escrow or Stock Purchase Agreement and, in fact, did not even mention those documents. Rather, the order addressed whether Presstek or Silver had engaged in any conduct that would cause or permit the Asset Purchase Agreement to be avoided under § 363(n) of the Bankruptcy Code. Although the order approved the sale, holding that all of MHR's objections were either resolved or overruled, it expressly preserved any of MHR's claims alleging Presstek's breach of the Escrow or Stock Purchase Agreement:

> "Notwithstanding any provision in this Plan or the Confirmation Order to the contrary, but subject to the terms of the Presstek

> Settlement Agreement and Presstek Settlement Order, nothing herein or in the Confirmation Order shall constitute a waiver, release or otherwise negatively impact or impair any claim, right or cause of action that MHR or MHR Fund may hold against Presstek, Inc. and its subsidiaries, and affiliates, including its officers, directors, employees and legal and financial advisors; *provided however*, nothing herein shall revive any claim released pursuant to the Presstek Settlement Order, as amended, or the Presstek Settlement Agreement (emphasis in original)."

MHR appealed to the United States District Court for the District of Delaware but did not seek a stay of the implementation of the order. After a hearing on Presstek's motion to dismiss the appeal as moot because MHR failed to seek a stay, the court granted the motion. In addressing MHR's argument regarding "good faith," the Court noted that pre-bankruptcy petition conduct was relevant to a § 363(m) good faith finding only if that conduct actually impeded the auction process. *In re Abbotts Dairies of Pa.* (788 F2d 143 [3d Cir 1986]), relied upon by MHR, "speaks expressly to a corrupting of the process by collusion and fraud in the way the auction process is developed and there is nothing remotely like that in this case." In the end, as a result of ABD's bankruptcy, MHR received only $175,000 for its ABD notes.

MHR commenced the instant action in New York County Supreme Court against Presstek and Silver alleging breach of the Stock

Purchase and Escrow Agreements. Paragraphs 9 through 25 of the complaint were substantially the same as paragraphs 7 through 20 of MHR's supplemental objections in the bankruptcy proceeding. The supplemental objections also charged Presstek with breach of the Escrow Agreement and Stock Purchase Agreement.

Presstek moved for summary judgment on various grounds, including that MHR was collaterally estopped and barred by res judicata because the claims asserted in the complaint had been asserted and determined in the prior court proceedings. By order entered July 26, 2007, the court granted the motion and dismissed the complaint on the grounds of res judicata and collateral estoppel, and upon reargument, the court adhered to its initial decision. Although I agree with the majority that plaintiff's breach of contract claim was neither collaterally estopped nor barred by res judicata by the bankruptcy proceeding, I respectfully disagree with its holding that the complaint should be dismissed in any event.

According to the majority, there is no breach of contract claim because Key Bank failed to sign the consent form as required by the escrow agreement. I disagree because in my opinion there are material issues of fact related to Presstek's conduct that prevent summary dismissal of the breach of contract claim. Initially, it should be noted that Lugli, who was negotiating on behalf of Key Bank, testified that when he met with Presstek on June 16, 2004 the topic of a consent agreement had never been broached. Indeed, according to Lugli, he was unaware that he was required to sign a consent agreement. Perhaps the reason for this is that a Key Bank form of consent was MHR's (not Presstek's) idea and the record indicates that Presstek was aware that MHR's concern was simply funding until closing.

Moreover, notwithstanding Key Bank's initial posture, it clearly informed Presstek at 5:10 p.m. on June 22 that it consented to "the Proposed Transaction pursuant to the terms that have been outlined to" Key Bank and the letter was signed by Lugli. Presstek's general counsel (Scafide) testified that after receiving Key Bank's June 22nd letter, he and Presstek's CFO spoke with Lugli by telephone and Lugli refused to sign the consent. Scafide insisted, however, that Lugli agree to an "unlimited amount" of funding notwithstanding that the Stock Purchase Agreement capped funding at closing to $26 million. Shortly afterward, Presstek terminated the agreement because Key Bank failed to sign the consent agreement.

One day after termination, Presstek had drafted a term sheet for a significantly cheaper purchase of ABD's assets under the new Asset Purchase Agreement. This new agreement was structured so that "[m]any liabilities [were] 'left behind'" (including, according to MHR, Presstek's obligations to MHR), and it was about $40 million less than the previous transaction. MHR also noted that Presstek negotiated the financially attractive new agreement with ABD for over three weeks with no written agreement from Key Bank regarding funding, suggesting that funding was not Presstek's concern.

Given ABD's dire financial condition, it went along with the less attractive deal. Under these circumstances, there are issues of fact as to whether Presstek's termination of the agreement was a mere ruse to pursue a more favorable deal (*see ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 491 [2006]). "[A] party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*Kooleraire Serv. & Installation Corp. v Board of Educ. of City of NY*, 28 NY2d 101, 106 [1971]).

Moreover, as noted above, the breach of contract claim was not barred or collaterally estopped by the Bankruptcy Court's final order. Pursuant to New York's transactional approach to the doctrine of 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" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). "[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, 293-94 [2005] [citation omitted]), and even if the claims "would call for different measures of liability or different kinds of relief" (Smith-Russell Sage Coll., 54 NY2d 185, 192 [1981] [citation omitted]).

Collateral estoppel, on the other hand, "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 [1997], quoting *Allied Chem. v Niagara Mohawk Power Corp.*, 72 NY2d 271, 276 [1988], *cert denied* 488 US 1005 [1989]; *see also Aryeh v Altman*, 36 AD3d 492 [2007] [collateral estoppel barred subsequent challenge to status of party as good faith purchaser where the issue had been raised in Bankruptcy Court in proceedings culminating in order approving reorganization plan]).

Here, neither res judicata nor collateral estoppel precludes MHR from pursuing its breach of contract claim against Presstek.

First, viewing the facts in the light most favorable to the party opposing summary judgment (*People v Grasso*, 50 AD3d 535, 544 [2008]), the record indicates the Bankruptcy Court assigned that claim to MHR to pursue at a later date. In fact, the Bankruptcy Court's order quotes the newly substituted language of the liquidation plan that "nothing herein or in the Confirmation Order shall constitute a waiver, release or otherwise negatively impact or impair any claim, right or cause of action that MHR or MHR Fund may hold against Presstek, Inc. and its subsidiaries, and affiliates, including its officers, directors, employees and legal and financial advisors."

Second, as indicated above, counsel for Presstek stated on the record several times that whether Presstek breached the Escrow and Stock Purchase Agreement was not currently before the court and that it was prepared to litigate that issue at a later date if and when MHR were to commence an action.

Third, and also very telling, is the fact that Presstek balked at the Bankruptcy Court's decision to assign the claim to MHR notwithstanding its earlier claim that it was prepared to litigate the issue at a later date. In an effort to have his cake and eat it too, counsel sought to convince the Bankruptcy Court that the elimination of the breach of contract claim was part of the consideration for the Asset Purchase Agreement that was approved by the court. The Bankruptcy Court apparently rejected Presstek's argument, however, because, as noted above, the written order expressly assigned the claim to MHR.

Fourth, and aside from the fact that the breach of contract claim was expressly relegated to a different forum in the future, res judicata is inapplicable here because the Bankruptcy Court never had jurisdiction over any claims between MHR and Presstek. Res judicata is inapplicable where a plaintiff is "unable to . . . seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain" a certain form of relief (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting the Restatement [Second] of Judgments § 26[1][c]). In other words, nondebtor MHR had no ability to assert its state-law contract claims against nondebtor Presstek before the Bankruptcy Court. "It is not sufficient that the putative 'related to' proceeding and a controversy involving the bankruptcy estate have common issues of fact"; a Bankruptcy Court has no jurisdiction over a contract between non-debtors (*19 Court St. Assoc. v Resolution Trust Corp.*, 190 BR 983, 996 [SD NY 1996]; *see also Newin Corp. v Hartford Acc. & Indemn. Co.*, 37 NY2d 211 [1975]).

Indeed, the facts in this case are similar to those addressed by the Court in *Newin*. There, plaintiffs - the New York Stock Exchange and its subsidiary, Newin Corporation - sued two insurance companies alleging, inter alia, that the companies had engaged in fraudulent conduct that denied plaintiffs' access to excess insurance coverage for losses resulting from the bankruptcy of Haupt, a NYSE member. The defendant insurance companies (collectively, Fidelity) moved to dismiss, contending, inter alia, that a settlement by the trustee in the bankruptcy proceeding - to which plaintiffs had objected - precluded any further litigation. The Court of Appeals affirmed the denial of Fidelity's motion and held:

> "Res judicata . . . need not long detain us. It is clear from even a cursory reading of the bankruptcy referee's opinion, that he made no finding as to the truth or falsity of plaintiffs' charges. He dealt only with the rights of the Haupt estate. The issues concerning the excess coverage bonds were not before him. *The question of whether Fidelity's conduct damaged plaintiffs by breach of any independent duties owed to them could not be litigated in that forum.* Unless the issues have "necessarily been decided" in earlier proceedings, res judicata and collateral estoppel are unavailable as defenses to prevent their trial." (*Id.* at 216, emphasis added, citations omitted).

With respect to collateral estoppel, there was no identity of issues (*Ross v Medical Liab. Mut. Ins. Co.*, 75 NY2d 825 [1990]; *Matter of Halyalkar v Board of Regents of State of N.Y.*, 72 NY2d 261, 266 [1988]). The determination of the breach of contract issue was not necessary or essential to the decision to approve the Asset Purchase Agreement pursuant to 11 USC § 363(b) and (m). If it had been, the Bankruptcy Court would not have assigned it to MHR. In any event, the District Court held that MHR's reading of *In re Abbotts Dairies of Pa.*, 788 F2d 143 (3d Cir 1986), was too broad, and that Presstek's alleged conduct with respect to the Stock Purchase Agreement and Escrow was not relevant to a § 363(m) good faith determination. Thus, Presstek failed to establish its entitlement to summary judgment on res judicata and collateral estoppel grounds, and accordingly, its summary judgment motion should not have been granted.

Although not reached by the motion court, Presstek's other grounds for summary judgment were meritless. According to Presstek, MHR had no standing to bring this action under the Stock Purchase Agreement as said agreement limited the number of parties that could claim benefit therefrom. The Stock Purchase Agreement, however, named certain third-party beneficiaries, including MHR and placed no limits on contractual enforcement by parties to the other related agreements. The latter included the

Distribution Agreement pursuant to which MHR consented to the Stock Purchase Agreement and waived many of its rights under certain notes for payment of cash and stock from Presstek. MHR thus had standing to bring this action.

Finally, Presstek argued that MHR failed to join ABD and Paragon as necessary and indispensable parties. However, both ABD and Paragon released their claims against Presstek in the bankruptcy proceeding and thus have no interest in the outcome of any claims between MHR and Presstek; consequently, they are not necessary parties under CPLR § 1001(a) *(see Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 125 [1969]).

Accordingly, I would reverse the judgment appealed from.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 5, 2008

CLERK

AUG 5 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Milton L. Williams
James M. Catterson
Rolando T. Acosta, JJ.

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_______________________________________x

Duane Reade, Inc.,
Plaintiff-Appellant,

-against-

Cardtronics, LP,
Defendant-Respondent.

_______________________________________x

Plaintiff appeals from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered on or about September 21, 2007, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the cause of action for breach of contract, and granted plaintiff's cross motion for partial summary judgment on the second cause of action for a declaratory judgment with respect to the meaning of paragraph 11(a) of the second amendment to the parties' agreement to the extent of declaring in defendant's favor, and from a judgment, same court and Justice, entered thereon on November 15, 2007.

Kasowitz, Benson, Torres & Friedman LLP, New York (Daniel P. Goldberg and Zachary W. Mazin of counsel), for appellant.

Vinson & Elkins L.L.P., New York (Steven Paradise and Michael S. Davi of counsel), for respondent.

ACOSTA, J.

The issue in this case is the meaning of the parties' ATM placement agreement, which provides the particulars of compensation by defendant, an ATM company, to plaintiff, a drugstore chain, upon "branding" the ATMs with a major bank (JP Morgan Chase) and changing the previous payment structure such that Chase customers would not be required to pay a surcharge fee. We hold that the language of the agreement is ambiguous, and we therefore remand for trial.

In 1999, American Express Travel Related Services Company (Amexco) entered into a contract with plaintiff for the placement of Amexco's ATMs in plaintiff's stores. Two years later they amended the contract. Thereafter, in August 2003, with plaintiff's consent, Amexco transferred and assigned all of its rights, duties and obligations under the contract to defendant. Four months later, the parties further amended the contract, modifying several sections and adding new ones. This second amendment extended the life of the contract through 2014, and expanded the placement of ATMs from the originally agreed-upon six locations in the center of commercial midtown Manhattan to roughly 200 locations across the greater New York metropolitan area.

The second contract amendment also included a provision, paragraph 11(a), concerning "Bank Branding," which is at the center of this dispute:

> "Both parties acknowledge that a 'Bank Branding' arrangement with a large well-known financial institution (a 'bank') covering and affecting the ATMs will benefit [plaintiff] by increasing foot-traffic in the affected store locations. 'Bank Branding' means permitting a bank to so mark or brand an ATM such that to any person using the ATM it will appear to be owned or operated by that bank, notwithstanding the fact that the ATM continues to be owned, managed and operated by [defendant]. Additionally, the bank's customers will be able to use any such branded ATM without paying any surcharge. *In recognition of these lost surcharge transactions and to preclude any loss of fees payable to [plaintiff] hereunder, as of the date any Bank Branding arrangement becomes effective, [defendant] will determine the number of surcharged transactions conducted by said bank's customers during the immediately preceding month at all of the ATMs covered by such arrangement (the 'Branding Surcharge Transactions') and thereafter through the term of this Agreement on a monthly basis will credit [plaintiff] with the full amount of the Branding Surcharge Transactions*. [Plaintiff] agrees not to unreasonably withhold its consent to any Bank Branding arrangement that [defendant] may present to [plaintiff] provided that the bank covered by the proposed arrangement is one of the top five largest banks or bank holding companies in the United States. [Defendant] agrees to present, in conjunction with its chosen banking partner, a Bank Branding proposal to

> [plaintiff] within twelve (12) months of the execution of this Second Amendment. Failure to present a Bank Branding proposal within twelve (12) months from the date of execution of this Second Amendment will result in [defendant] paying [plaintiff] a penalty of ten thousand dollars ($10,000) per month until such Bank Branding proposal is presented to [plaintiff] (emphasis added)."

In March 2005, defendant and Chase executed a branding agreement, with plaintiff's approval, to brand the ATMs in plaintiff's stores with the Chase name and trademark. Prior to the branding, all cardholders from any bank paid a surcharge for cash withdrawals. Following the branding, Chase cardholders would not be subject to a surcharge when withdrawing cash. Defendant commenced branding the ATMs in the summer of 2005.

In September 2005, plaintiff asserted that defendant was paying it improperly. In a letter dated October 24, 2005, plaintiff advised defendant that it interpreted the contract language at issue to mean it would be paid "one month in arrears" for all Chase transactions at branded ATMs according to the fee schedule throughout the duration of the contract. Defendant argued that it was required to make a determination of the amount of Chase transactions only once - the month before the branding agreement took effect - and pay that amount to plaintiff each month for the duration of the contract.

On October 10, 2006, plaintiff commenced this action for breach of contract and a declaratory judgment interpreting paragraph 11(a) of the parties' agreement. Supreme Court dismissed the breach of contract cause of action, concluding that by the plain meaning of paragraph 11(a), "the amount of the payment . . . is the amount determined in that one calculation of the number of surcharged transactions in the month immediately preceding the effective date of the Arrangement. No other interpretation gives meaning to the terms, or, indeed, the paragraph as a whole" (17 Misc 3d 1101A, NY Slip Op. 51785[U], 2007 NY Misc LEXIS 6427 *3, 2007 WL 2756961 *2). Thus, the court granted plaintiff's cross motion for summary judgment as to the meaning of paragraph 11(a) to the extent of making a declaration in defendant's favor.

On appeal, the standard of review is for this Court to examine the contract's language de novo (*Gulf Ins. Co. v Transatlantic Reins. Co.*, 13 AD3d 278, 279 [2004]). Our function is to apply the meaning intended by the parties, as derived from the language of the contract in question (*Lopez v Fernandito's Antique*, 305 AD2d 218, 219 [2003]). A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). In searching for the intent of the parties, our goal must be to accord the words of the contract their "fair and reasonable meaning" (*Heller v Pope*, 250 NY 132, 135 [1928]). In other words, "the aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977], *quoting* 1 Corbin, Contracts, § 1). "[N]ot merely literal language, but whatever may be reasonably implied therefrom must be taken into account" (*Sutton v East River Sav. Bank*, 55 NY2d 550, 555 [1982]).

Here, the parties contend that the language is clear and unambiguous, but each has attached a materially different meaning to paragraph 11(a). Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources (*Kass v Kass*, 91 NY2d 554, 566 [1998]).

Paragraph 11(a) defines Bank Branding as labeling the ATMs to lead the customer to believe the ATM is owned and operated by a particular bank, when it is actually controlled by defendant.

The Bank Branding arrangement also changes the surcharge structure for Chase customers, exempting them from having to pay any surcharge. The formula for determining the monthly payments under the contract is calculated "[i]n recognition of these lost surcharge transactions and to preclude any loss of fees payable to [plaintiff] hereunder." We agree with plaintiff that application of the last antecedent doctrine is required to construe this clause properly. Relative or qualifying words or clauses in a statute ordinarily are to be applied to words or phrases immediately preceding, and are not to be construed as extending to others more remote, unless the intent clearly indicates otherwise (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 254). Applied to a contract, this doctrine becomes essentially an application of English language grammar, with an eye to the four corners of the contract.

In the instant case, the construction of the sentence seems to establish that the demonstrative adjective "these" modifies "lost surcharge transactions," and the nominative phrase "these lost surcharge transactions" can only be a reference to the preceding sentence's description of transactions where "the bank's customers *will* be able to use any such branded ATM without paying any surcharge" (emphasis added) (*compare Remba v Federation Empl. & Guidance Serv.*, 149 AD2d 131, 137 [1989], *affd* 76 NY2d 801 [1990]). Even though the word "lost" can be construed as describing transactions that have already taken place, "these lost surcharge transactions" equally refer to future transactions to be conducted by Chase customers, as well as transactions by the Chase customers that used the ATMs in the month prior to branding. Additionally, a portion of the same sentence promises "to preclude any loss of fees payable to [plaintiff] *hereunder*" (emphasis added); the word "hereunder" refers to the first part of this sentence, i.e. "[i]n recognition of these lost surcharge transactions," which, as aforementioned, refers to future transactions by Chase customers who will not be charged a fee.

Paragraph 11(a) reveals that Bank Branding will benefit plaintiff[1] by increasing the foot traffic in its stores; it is

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[1] Although not expressly stated, Bank Branding is mutually beneficial to both parties. In Section 8 of the Contract, the parties provide contingency plans for locales with low volume of transactions, thereby acknowledging that ATMs in some of plaintiff's stores may be cost-inefficient. Branding of the machines, with or without a surcharge-free population, would convert some of these placements from cost-inefficient to cost-efficient, thus benefitting plaintiff; likewise defendant would benefit by expanding its business into lower revenue locales. The second amendment does just this, allowing defendant to expand

reasonable to infer the parties' expectation that allowing surcharge-free transactions to one bank's customers will attract more of those customers to these ATMs than prior to Bank Branding, inasmuch as customers will now seek out plaintiff's stores and use these ATMs without having to go to Chase's own ATMs. The contract, therefore, anticipates both increased foot traffic and a loss of fees payable to plaintiff as a result of the new surcharge structure, in that the surcharge fees are waived for one type of customer where none were waived before.[2] It could be reasonably argued that because both results are separately accounted for, it is not the contract's plain meaning for one to serve as the remedy for the other. In other words, increased foot traffic alone may not be meant to compensate plaintiff for the lost surcharge fees, but rather to serve as a separate incentive for plaintiff to agree to the ATM branding.

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its business considerably.

[2] The agreement with Amexco precluded compensation to plaintiff from Amexco customer transactions. However, at the time of the branding agreement plaintiff and defendant had been in business without a similar surcharge-free population for upwards of a year. Moreover, Amexco is a credit card company, which provides for significantly less withdrawal transaction opportunities than with one of the five major checking banks in the United States, as made available in paragraph 11(a). Drawing a parellel between Amexco and Chase is unconvincing, at best.

If so, notwithstanding the increased foot traffic, the contract's goal is to compensate "for loss of fees payable to [plaintiff]" due to the revenue that will no longer be collected as surcharges from Chase customers.

We note that plaintiff's position draws support from the fact that its interpretation of paragraph 11(a) follows the spirit of the original contract, which, in section 5, calls for the good faith renegotiation of the surcharge revenue share in the event of a change in surcharge structure caused by new federal or state laws. Paragraph 11(a) addresses how, "in recognition of these lost surcharge transactions," the new surcharge structure will affect the revenue share between the parties. In the third and last clause of that same sentence, "Branding Surcharge Transactions" are defined as "the number of surcharged transactions conducted by said bank's customers during the immediately preceding month at all of the ATMs covered by such arrangement." The motion court, however, juxtaposed the middle clause of this sentence, "as of the date any Bank Branding arrangement becomes effective," with the words "preceding month" from the middle of the third clause. This middle clause arguably indicates that starting on the effective date of the branding agreement, defendant was required to do two things listed in the next clause: count the Branding Surcharge Transactions during one month, and then credit plaintiff with those Branding Surcharge Transactions in the following month.

The motion court noted that the provision distinguished between the "immediately preceding month" and "on a monthly basis," and stated that if the "calculation and payment were both to have been on a monthly basis, the Arrangement would have, or should have, stated so." We disagree that this is the only practical interpretation. The language does not detail how to calculate the monthly transactions. The amount could have been calculated on any iteration, be it every month or every day, so long as plaintiff was credited on a monthly basis for the preceding month's actual transactions.

Furthermore, using only one month as a basis for compensation is arguably contrary to common sense. Defendant argues that the "loss of fees payable" to plaintiff includes only those from "Chase cardholders willing to use [defendant's] ATMs in [plaintiff's] stores" even if they have to pay a surcharge, and thus, plaintiff is not "los[ing] fees that it would have been entitled to absent the bank branding arrangement." This argument overlooks that the use of a fixed payment based on the Chase cardholders who were willing to use defendant's ATMs in plaintiff's stores during one month arbitrarily decided by the date of the branding agreement ignores the natural and obvious fluctuations throughout the year, such as holidays when transactions are high and yield larger profits to the parties, and conversely, post-holiday periods when revenue is necessarily lower.

The motion court conceded that a contract should be construed so as to give full meaning and effect to all of its provisions (*Trump-Equitable Fifth Ave. Co. v H.R.H. Constr. Corp.*, 106 AD2d 242, 244 [1985], *affd* 66 NY2d 779 [1985]), but without disregarding "common sense . . . in favor of formalistic literalism" (2007 NY Misc LEXIS 6427, *3, 2007 WL 2756961, *2; *see Farrell Lines, Inc. v. New York*, 30 NY2d 76 [1972]; *Aron v Gillman*, 309 NY 157, 163 [1955], 11 Lord, Williston on Contracts, § 32.9 [4th ed]). The court correctly explained that paragraph 11(a) is based on the fact that "that there would no longer be 'surcharged transactions' for Chase customers after the effective date" (2007 NY Misc LEXIS 6427, *3, 2007 WL 2756961, *2); conversely, before the branding agreement came into effect, there were no surcharge-free withdrawals (i.e., "lost surcharge transactions") to be recognized, and thus there could not yet have been any corresponding "loss of fees payable to [plaintiff]" to "preclude." Moreover, it has long been the rule, in construing contracts, that "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Atwater & Co. v Panama R. R. Co.*, 246 NY 519, 524 [1927]). This analysis indicates that the paragraph in question and this sentence's first clause attempt to compensate plaintiff for the loss of surcharges on future transactions on Chase-branded ATMs. The intended calculation of such hypothetical compensation would necessarily also be prospective.

On the other hand, and favoring defendant's position detailed by the motion court, is the view that once the branding agreement took effect there would be no surcharged transactions and hence plaintiff could not be entitled to payments based upon the number of nonexistent transactions. Also, the effect of adopting plaintiff's interpretation is to require defendant to pay for the increase in transactions after branding, when the purpose of the amendment could have been to compensate for loss of fees otherwise generated before there was branding. The logic of this interpretation and its result can reasonably be questioned.

Hence, in the face of the countervailing possible interpretations of the contract, we find the agreement ambiguous and remand for a trial.

Accordingly, the judgment of the Supreme Court, New York County (Bernard J. Fried, J.), entered November 15, 2007, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the cause of action for breach of contract, and granted plaintiff's cross motion for partial summary judgment on the second cause of action for a declaratory judgment with respect to the meaning of paragraph 11(a) of the second amendment to the parties' agreement to the extent of declaring in defendant's favor, should be reversed, on the law, with costs, defendant's motion denied, the breach of contract cause of action reinstated, plaintiff's cross motion denied and the matter remanded for further proceedings. The appeal from the order, same court and Justice, entered on or about September 21, 2007, should be dismissed, without costs, as subsumed within the appeal from the judgment.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 5, 2008

CLERK