COURT OF APPEALS NO. CTQ-2020-00003

TO BE ARGUED BY:
ABDUL K. HASSAN, ESQ.
TIME REQUESTED: 20 MINUTES

State of New York
Court of Appeals

CHARLENE SIMMONS,

Plaintiff-Appellant,

-against-

TRANS EXPRESS, INC.

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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United States Court of Appeals for the Second Circuit
Eastern District of New York (Brooklyn), Docket 19-438

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I. PRELIMINARY STATEMENT

Plaintiff-Appellant Charlene Simmons ("Plaintiff," "Appellant" or "Simmons"), hereby submits this brief in reply to the opposing brief of Defendant-Respondent Trans Express Inc. ("Defendant," "Respondent," or "Trans Express") (Def. Br.), and in further support of her appeal. Some of Defendant's arguments were already addressed in Plaintiff's opening brief ("Pl. Br."), but some additional points will be addressed herein.

Defendant does not really or genuinely dispute that the text of the New York City Civil Court Act ("NYCCCA") § 1808, does what it says – allowing claims in a subsequent action "involving the same facts, issues and parties" as the small claims court action and allowing for a setoff of duplicate recovery in the monetary amount of the small claims judgment. Specifically, Defendant now concedes that the statutory language and offset provision do allow for subsequent *claims*, but now argues that only claims in six certain categories are allowed. Significantly, even though Defendant's newly created "six categories" argument is wholly without merit, the fact that Defendant now concedes that the statutory language on its face does permit for subsequent *claims* as opposed to something else or nothing, in essence destroys Defendant's position and opposition in this matter. As to Defendant's newly created argument that the claims allowed in a subsequent action are limited to six certain categories, such a limitation cannot be found in the

statutory text, cannot be found in the legislative history, cannot be found in any of the cases or even in Defendant's papers previously filed in this case. It appears that Defendant simply created the "six categories" argument that has no basis in fact and the law of NYCCCA § 1808, to try to keep the process going in light of the Second Circuit's obvious conclusion that the "The text's plain meaning thus strongly supports Simmons's interpretation" – a conclusion that is compelled by the statutory text which allows claims in a subsequent action even "involving the same facts, issues and parties." NYCCCA § 1808.

Realizing that the text of the statute is an insurmountable obstacle for it, Defendant argues that we should look at *context over text*. Specifically, Defendant argues that we should look at the context/legislative history of the 2005 amendment of NYCCA § 1808. However, the context/legislative history of the 2005 amendment is just as fatal to Defendant's position, and in many ways even more so, than the statutory text of NYCCA § 1808. In this regard, the legislative history specifically states that the goal of the amendment was to "harmonize[] the statutory provision with case law," New York Bill Jacket, 2005 A.B. 4320, Ch. 443, and cited to five cases which it said "have consistently held that a small claims judgment is res judicata when the *same* claim is filed in another court." Indeed, an examination of the cases like *64 W. Park Ave. Corp. v. Parlong Realty Corp.*, 77 Misc. 2d 1019, 1021, 354 N.Y.S.2d 342, 345 (N.Y. Sup. Ct. 1974),

leaves no doubt that the current version of NYCCCA § 1808 allows res judicata only in situations involving the same or identical claim and not in situations with different or related claims even including those "involving the same facts, issues and parties," which "shall be reduced by the amount of a judgment awarded under this article," in the event of duplicate recovery. NYCCCA § 1808.

Defendant's position and arguments appear to center on several fundamental misconceptions and a few clarifications may be helpful in this regard.

First, the legislature can create its own narrow form of preclusion that is different from traditional res judicata and collateral estoppel. As such, consistent with the certified question, the relevant question here is what the statute at NYCCCA § 1808 allows – it is not what traditional res judicata or collateral estoppel allows – the text of the statute does not even mention these terms.

Second, it appears that Defendant fails to grasp the connection between collateral estoppel and claims. Even though collateral estoppel is generally referred to as issue preclusion, prohibiting collateral estoppel allows claims to be brought that would have otherwise failed because of the application of collateral estoppel. As such, even if the subject statutory language is referred to as collateral estoppel, the effect is the allowance of claims in a subsequent action.

Third, this Court has a legal duty to follow the statute, but it has no obligation to follow lower or other courts on issues of New York law. As such, if a

ruling from another or lower court conflicts with NYCCCA § 1808, the statute prevails and must be followed by this Court. Here, it is clear that the statutory language of NYCCCA § 1808 even allows claims in a subsequent action "involving the same facts, issues and parties," with a setoff for duplicate recovery, and therefore, would clearly allow the claims in this action, and even more so. Finally, given the remedial nature of the statute and its goal to "protect the parties from any unforeseen consequences of the small claims proceeding," New York Bill Jacket, 2005 A.B. 4320, Ch. 443, any doubts should be resolved in favor of allowing the claims in this action – there is nothing more unforeseen and counterintuitive to the lay persons who use the informal procedures of small claims court without an attorney than the loss of claims that were never brought or adjudicated.

II. ARGUMENT

1. DEFENDANT DOES NOT REALLY OR GENUINELY DISPUTE THE SECOND CIRCUIT'S CONCLUSION THAT THE STATUTORY "TEXT'S PLAIN MEANING THUS *STRONGLY SUPPORTS* SIMMONS'S INTERPRETATION"

This appeal and the certified question centers on the interpretation of New York City Civil Court Act ("NYCCCA") NYCCCA § 1808, which reads in relevant part as follows:

> A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or

> court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article

Like the U.S. Supreme Court and the Second Circuit, the New York Court of Appeals has repeatedly instructed us that when the statutory text is not ambiguous or absurd, the interpretative exercise begins and ends with the statutory text. See i.e. *Kimmel v. State*, 29 N.Y.3d 386, 392, 80 N.E.3d 370, 374 (2017, Judge DiFiore); *Cty. of Chemung v. Shah*, 28 N.Y.3d 244, 263, 66 N.E.3d 1044, 1051–52 (2016, Judge Rivera); *People v. Holz*, 35 N.Y.3d 55, 59, 148 N.E.3d 513, 516 (2020, Judge Fahey).

Realizing the importance of the statutory text, the Second Circuit correctly and powerfully agreed with Plaintiff as follows (A142):

> It cannot be doubted that Simmons's textual contentions have persuasive force. Section 1808 clearly contemplates a subsequent action "involving the same facts, issues and parties" as the small claims court action. The statute even provides for a set-off in those circumstances: "a subsequent judgment . . . shall be reduced by the amount of a judgment awarded" in small claims court. The text's plain meaning thus strongly supports Simmons's interpretation.

Indeed, Defendant now appears to agree that the statutory text of NYCCCA § 1808 limits res judicata and allows subsequent claims "involving same facts, issues and parties." In this regard, Defendant states in relevant part as follows (Def. Br. 10):

> If small claims judgments have res judicata effect, why does Section 1808 contemplate a subsequent action "involving the same facts,

> issues and parties" and provide for a set-off in those circumstances? The answer is simple: there are multiple exceptions to res judicata under which a subsequent action "involving the same facts, issues and parties" could be maintained.

Significantly, Defendant concedes in the above excerpt that the specific statutory language does in fact limit res judicata by allowing claims in a subsequent action "involving the same facts, issues and parties," and with a monetary setoff for duplicate/identical recovery. The only question that remains which we will now easily answer is the scope of the limitation on res judicata under NYCCCA § 1808 – not whether the statutory text imposes limits on res judicata – just the scope of the limitation. In this regard, Defendant lists six limitations/exceptions on res judicata and argues these are the only six limitations. Defendant's argument easily fails for several compelling reasons.

First, the six limitations put forth by Defendant have to come from the legislature as they do not appear in the statute, the legislative history, any of the cases, or even Defendant's papers previously in this case until now. Notably, Defendant argues as follows (Def. Br. 9):

> Adhering to the actual language of Section 1808 is not only dictated by considerations of the line between judging and legislating, but also by respect for legislative policy judgments.

Applying Defendant's logic to its own "six categories" argument concerning the offset provision, "[Defendant's] proposed interpretation of Section 1808 requires the addition of language that appears nowhere in the current text of

Section 1808. Such additions are a legislative task, not a judicial task." (Def. Br. 10).

Second, if as Defendant claims, the six exemptions are already part of res judicata, there would be no need to add superfluous language duplicating the same six categories/exemptions – especially where the statutory language does not confine its allowance of subsequent claims to the six categories/exemptions listed by Defendant, and does not even mention any of Defendant's "six categories."

Third, Defendant's version of res judicata would not even allow the six categories/exemptions it has created at this late hour to try to climb the insurmountable hurdle of the statutory language, which as the Second Circuit concluded "strongly supports Simmons' interpretation." (A142). For example, the district court decision in this case appear to hold that if all remedies cannot be obtained in small claims court because of jurisdiction, etc., the plaintiff should forego small claims court and pick a higher court with jurisdiction to handle all her claims in the first place. See *Simmons v. Trans Express Inc.*, 355 F. Supp. 3d 165, 170, fn 2 (E.D.N.Y. 2019) ("Nonetheless, the prayer for a declaratory judgment will not save Simmons's claim because electing to sue in small claims court, where a declaratory judgment was unavailable, was a choice of remedy analogous to the choice Simmons made when she elected to pursue no more than $ 5,000 in

damages. As in *Chapman*, plaintiff could have sought all relief she desired by suing originally in this Court...").

Likewise, Defendant's example (Def. Br. 11), using *Weitz v. Wagner*, No. CV-07-1106(ERK)(ETB), 2008 WL 5605669, at 4 (E.D.N.Y. July 24, 2008), adopted (Aug. 11, 2008), is legally erroneous because claims under the federal Fair Credit Reporting Act ("FCRP"), can be brought in both state and federal court, and not just in federal court as Defendant argues. See 15 USC § 1681(p), "An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, *or in any other court of competent jurisdiction*…." In fact, FCRA claims are often brough in state court. See i.e. *Aldrich v. N. Leasing Sys., Inc.,* 168 A.D.3d 452, 91 N.Y.S.3d 401 (1'st Dep't 2019).

Traditional res judicata as currently constituted has two parts. In this regard, Defendant states in relevant part as follows (Def. Br. 2):

> Under res judicata, a final judgment on the merits precludes relitigating not only claims that were raised but also – and distinctively – claims that could have been raised in that action. Unraised claims are barred by res judicata as well as those that had been raised and decided.
>
> Here, Judge Vitaliano held that Simmons' federal court case was barred by res judicata because those additional claims could have been and should have been raised in a single action with her original claim.

As such, it is undisputed for purposes of this appeal, and especially for purposes of the certified question, that the federal and state statutory claims in this action were not previously raised or adjudicated and are not the same as the claim in small claims court. We also agree that the district court dismissed Plaintiff's claims in this action, not because they were brought and adjudicated in small claims court but because in its view "those additional claims could have been and should have been raised in a single action with her original claim." (Def. Br. 2).

Claims that could be brought are defined as those "based on the same harm and arising out of the same or related facts." *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347–48, 712 N.E.2d 647, 650 (1999). By contrast, NYCCCA § 1808 by its plain language permits claims in a subsequent action "involving the same facts, issues and parties." This means, that at minimum, the plain and clear text and language of NYCCCA § 1808, eliminated that part of traditional res judicata dealing with claims that could or should have been brought and adjudicated.

The only real question, therefore, is whether the first part of res judicata dealing with claims actually brought and adjudicated can survive under the text of NYCCCA § 1808. Ironically, we really do not need to answer this question because it is undisputed for purposes of this appeal and the certified question, that

the claims in this action were not actually brought and adjudicated in the small claims action.

Nonetheless, the legislative history and other factors explained below, suggests that res judicata as to claims actually brought and adjudicated survives under NYCCCA § 1808 and that under NYCCCA § 1808 res judicata applies only in situations involving the exact same or identical claim – an interpretation that also finds some support in the statutory text/title.

Defendant appears to argue that Plaintiff will need a legislative amendment of 1808 in order to have a same claim limitation on res judicata. (Def. Br. 8). However, the statute already allows the claims in this action because it specifically permits claims in a subsequent action even "involving the same facts, issues and claims." It is Defendant who needs an amendment.

In fact, if this court finds that the legislative history is ambiguous or is in conflict with the statutory text, the text controls and res judicata under NYCCCA § 1808 will not apply even in situations involving the exact same claims that were actually brought and adjudicated but the setoff in the amount of the small claims judgment will continue to apply in cases of duplicate/identical recovery as provided for in the text of NYCCCA § 1808 – a possible outcome recognized by the Second Circuit. (A142 – Second Circuit noting "the statute's clear language that "a subsequent judgment obtained in another action or court involving the same

facts, issues and parties" would seemingly not be precluded but merely be "reduced by the amount of a judgment awarded" in small claims court."). See i.e. *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). In such an outcome, the legislature can make any required amendment/changes at a later date if it wishes to allow any claim preclusion under NYCCCA § 1808.

2. DEFENDANT'S *CONTEXT OVER TEXT* ARGUMENT EASILY FAILS IN LIGHT OF THE STATUTORY TEXT AND LEGISLATIVE HISTORY

Unable to counter the text of the statute which strongly favors Plaintiff's interpretation, Defendant tries to avoid the text and argues context over text as follows (Def. Br. 5, fn 1):

> Simmons' "textual analysis" argument (Appellant's Brief at pp. 10-13) divorces "text" from "context." Where, as here, the statutory text has been amended, it is essential to address the context: i.e., the statutory history. Justice Holmes' admonition remains true a century later: "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). Here, the current text can only be understood in light of the 2005 legislative amendment; the current textual language cannot be read out of that context.

Even though we are bound by the text of the statute in this case which requires a ruling in Plaintiff's favor, unfortunately for Defendant, the context of NYCCCA § 1808 and the 2005 amendment are also fatal to Defendant's arguments, and possibly more so, as we will now explain further.

(A) AS STATED IN THE PURPOSE AND JUSTIFICATION SECTIONS OF THE LEGISLATIVE HISTORY, THE INTENT OF THE 2005 AMENDMENT WAS TO "HARMONIZE[] THE STATUTORY PROVISION WITH CASE LAW" AND THE CASE LAW CITED IN THE LEGISLATIVE HISTORY EXPLICITLY STATES THAT RES JUDICATA UNDER 1808 REQUIRES "IDENTITY OF CAUSES OF ACTION" ALSO REFERRED TO AS "THE SAME CAUSES OF ACTION"

The "Purpose" and "Justification" sections of the legislative history specifically state that the intent of the 2005 Amendment to NYCCCA § 1808 was to "harmonize the statutory provision with case law" and cites to five cases as follows (New York Bill Jacket, 2005 A.B. 4320, Ch. 443):

> The courts have consistently held that a small claims judgment is res judicata when the same claim is filed in another court. Rosen v Parking Garage, Inc., 40 Misc2d 178 (N.Y. City Civ. Ct., 1963); 64 West Park Avenue v Parlong Realty Corp., 77 Misc2d 1019 (N.Y. Sup. Ct., 1974); Royster v Consolidated Edison, 114 Misc2d 529 (N.Y. City Civ. Ct., 1982); Hayden v Long Island Lighting Company, 116 Misc2d 529 (Dist. Ct., Nassau County, 1982); Omara v Polise, 163 Misc2d 989 (App. Term, 2nd and 11th Dists., 1995).

At the outset, the legislative history makes clear that the amendment was to align the statute with the holding in the cited cases that "a small claims judgment is res judicata when the *same claim* is filed in another court." (New York Bill Jacket, 2005 A.B. 4320, Ch. 443).

Of the five cases, some are very brief without much factual detail and others are more extensive. The decision in *64 W. Park Ave. Corp. v. Parlong Realty*

Corp., 77 Misc. 2d 1019, 1021, 354 N.Y.S.2d 342, 345 (N.Y. Sup. Ct. 1974), which was cited to in the legislative history, defined and described res judicata as follows:

> Res judicata, meaning "a matter adjudged", Black's Law Dictionary, 1470 (4th ed., 1951), is the conclusive establishment of legal relations between parties by virtue of a final judgment. Res judicata effect is given to judgments of limited as well as general jurisdiction. (Hallock v. Dominy, 69 N. Y. 238.) A judgment then acts to bar a subsequent action raising the same causes of action. (Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N. Y. 304; Perry v. Dickerson, 85 N. Y. 345.) Identity of causes in two actions of which one has proceeded to judgment is determined by whether a different judgment in the remaining action would impair the rights adjudged in the first. (Andrews v. Merrywood Country Club, 28 A D 2d 865.)

As such, in amending NYCCCA § 1808 to reflect cases like *64 W. Park*, the legislature intended res judicata under NYCCCA § 1808 to only apply where there was an "Identity of causes in two actions," also described as "a subsequent action raising the same causes of action." By way of reinforcement, the court in *64 W. Park*, 354 N.Y.S.2d at 342, applied res judicata in this manner and stated in relevant part as follows:

> The first cause of action here, claiming fraud and misrepresentation, was not the cause of action set forth by "64" in its prior District Court counterclaim. There was no monetary damage claimed for oral misstatements, indeed no falseness or deceit claimed at all. Only a "personal representation" by the Alperns that the leasehold at 64 West Park Avenue "would be made part of the said contract of sale" was alleged without any further mention. No reference is made to the amount of the security deposit, nor to the ownership of fixtures. There being then a lack of identity in causes of action, the judgment

> dismissing the counterclaim is not a res judicata bar to the first cause of action here. (Bell v. Herzog, 39 A D 2d 813.)
>
> In contra-distinction, the second and third causes of action here are virtual carbon copies of the District Court counterclaim. The underlying grounds alleged, conversion of fixtures and tenant damage to premises upon vacating, are identical in both pleadings. The dollar damage claimed is exactly the same. No additional factors or elements were added in the later claim. There is some slight amplification now in detail of fixture removal and building destruction, but not beyond the reasonable inference of the prior counterclaim, and, in any event, included within the scope of the bill of particulars served in response to Dr. Kanfer's demand in the District Court. A judgment in favor of plaintiff here would inevitably impair rights accruing to Dr. Kanfer from the prior judgment of dismissal.

In other words, in amending NYCCCA § 1808 in 2005, the legislature cited to and adopted the rejection of res judicata in *64 W. Park* where there was a "lack of identity of causes of action" and even where the causes of action in both cases were similar and involved the same facts, issues and parties, and apparently came from the same transaction or series of transactions. In this regard, the cause of action in *64 W. Park* as to which res judicata was rejected was apparently based on the same representations which gave rise to similar and related claims in the two actions but based on different legal grounds and theories.

Similarly, in amending NYCCCA § 1808 in 2005, the legislature cited to and adopted the application of res judicata in *64 W. Park*, as described herein, where the claims in the two actions were "virtual carbon copies," where the "underlying grounds alleged … are identical in both pleadings," where "the dollar

damage claimed is exactly the same" and where "No additional factors or elements were added in the later claim." None of these requirements for res judicata under NYCCCA § 1808 are met in this case. For purposes of this appeal and certification, the claims are not the same and are not identical, as also explained at pages 8-9 above.

The decision in *Royster v. Consol. Edison*, 114 Misc. 2d 529, 532, 452 N.Y.S.2d 146 (Civ. Ct. 1982), was also cited in the legislative history. The court in *Royster* cited to *64 W. Park*, and consistent with Plaintiff's position herein applied res judicata under NYCCCA § 1808 because "there is an attempt by Royster to *duplicate* the claim *in full*." In fact, the plaintiff in *Royster* did not appear to dispute that he was attempting to bring the exact same claim - but felt he should have been able to do so because of a decision in another case by the New York Court of Appeals that allowed him to reassert his claim. Here, for purposes of this appeal and certification, the claims in this action are not the same as in the small claims action, as also explained at pages 8-9 above.

Like *Royster*, *Omara v. Polise*, 163 Misc. 2d 989, 990, 625 N.Y.S.2d 403, 404 (App. Term 1995), which was cited in the legislative history, also held that, "The attempt to *duplicate* the claim *in full* made it a "res judicata" ("claim preclusion") situation" – the use of the terms "duplicate" and "in full" confirms the holding that res judicata under NYCCCA § 1808 only applies when he we are

dealing with the exact same claim and not different or related claims "involving the same facts, issues and parties." NYCCCA § 1808.

The fourth case cited in the legislative history is *Hayden v. Long Island Lighting Company*, 116 Misc. 2d 529 (Dist. Ct., Nassau Co., 1982) in which the court held that "The Small Claims Court Act does address the res judicata doctrine by severely limiting its effect," and holding that NYCCCA § 1808 would allow a claims in "separate action" based on the same "facts at issue" in the small claims action. Notably, as well, the court in *Hayden*, described the liberal policy of small claims court of providing quick and informal procedures and rejected the argument like that made by Defendant here concerning the potential for abuse (Def. Br. 9) – the court noted that "Also available to the corporate defendant is UDCA Section 1810 permitting the Clerk to restrict the availability of small claims courts' procedures upon the finding that they will be used for harassment." There was only one filing in small claims court by Plaintiff in this matter.

The fifth and final case cited in the legislative history is *Rosen v. Parking Garage Inc.*, 40 Misc.2d 178, 242 N.Y.S.2d 677. However, the *Rosen* decision is very brief and does not describe the causes of actions but *Rosen* is cited in cases like *Omara*, and is cited in the legislative history for the proposition "that a small claims judgment is res judicata when the *same claim* is filed in another court" – but

not when different or related claims are subsequently brought in another court "involving the same facts, issues and parties." NYCCCA § 1808.

Defendant invokes the 2005 amendment of the statute and argues as follows (Def. Br. 4):

> The 2005 amendment eliminated Section 1808's limits on res judicata altogether by completely striking res judicata from the statutory text

However, while striking the language confining res judicata to a monetary amount, the legislature also added language which Defendant appear to concede, allows claims in a subsequent action "involving the same facts, issues and parties," and providing a setoff for duplicate/identical recovery. As such, when viewed more completely and in proper context, Defendant's argument about the stricken text has no merit and is has no support in the text of the statute or the legislative history – especially the cases cited in the legislative history as examined above – cases it appears that Defendant did not address.

It does not appear that Defendant addressed any of the cases cited in the legislative history. Like the cases cited in the legislative history, *Katzab v. Chaudhry*, 48 A.D.3d 428, 849 N.Y.S.2d 804 (2008), also rejected Defendant's interpretation and held that NYCCCA § 1808 only applies in situations dealing with the same or identical claim but not related or different claims "involving the same facts, issues and parties." NYCCCA § 1808. Defendant tries to undermine *Katzab* by arguing as follows (Def. Br. 6-7):

> Katzab v. Chaudhry, 48 A.D.3d 428, 849 N.Y.S.2d 804 (2008) relied exclusively on case law interpreting the pre-2005 version of Section 1808. In contrast, Merrimack Mut. Fire Ins. Co. v. Alan Feldman Plumbing & Heating Corp., 102 A.D.3d 754, 961 N.Y.S.2d 183 (2013) applied the 2005 amendment to Section 1808 and properly held the second suit barred by res judicata. Contrary to Simmons, paying attention to the history of Section 1808 is what is outcome dispositive.

Defendant's argument is without merit because *Katzab* explicitly applied the current version of NYCCCA § 1808 that is at issue in this case and reliance on pre-amendment cases is absolutely proper because as the legislative history makes clear the whole purpose of the amendment was to "harmonize the statute with existing case law" New York Bill Jacket, 2005 A.B. 4320, Ch. 443 – like the pre-amendment cases cited in the legislative history itself and which were examined above.

Similarly, Defendant's reliance on *Merrimack Mut. Fire Ins. Co. v. Alan Feldman Plumbing & Heating Corp.*, 102 A.D.3d 754, 961 N.Y.S.2d 183 (2013), is grossly misplaced – the outcome in *Merrimack* is fully consistent with the "same claim" analysis as one cannot get more "same" or "identical" as an insurer standing in the shoes of its insured. But more importantly, the Appellate Division in *Merrimack* specifically reaffirmed *Katzab* and *McGhee*. S *Merrimack* 102 A.D.3d 754–55 (reaffirming the *same* claim analysis and stating that "*Katzab v. Chaudhry,* 48 A.D.3d 428, 849 N.Y.S.2d 804 and *McGee v. J. Dunn Constr. Corp.,* 54 A.D.3d 1010, 864 N.Y.S.2d 553 are not to the contrary, as the claims in

those cases were not the ***same*** as the ones previously asserted in small claims actions"). See also, *Farbstein v. Hicksville Pub. Library*, 323 F. Supp. 2d 414 (E.D.N.Y. 2004) ("upon review of the case law" concluding that New York small claims judgments only have res judicata effect as to "the *exact same claim* in subsequent proceedings"); *Walters v. T&D Towing Corp.*, No. 17CV0681JSAKT, 2018 WL 1525696, at 5 (E.D.N.Y. Mar. 28, 2018) (relying on Farbstein and applying the *same* claim standard in rejecting res judicata effect of NY small claims judgment).

It is not clear that the other lower court cases relied upon by Defendant cuts against Plaintiff. For example, Defendant relies heavily on *Tovar v. Tesoros Prop. Mgmt., LLC*, 119 A.D.3d 1127, 1129–30, 990 N.Y.S.2d 307 (2014), but in *Tovar*, the court cited for support to Second Department's decisions in *Katzab*, *Merrimack* and *McGhee* – all of which affirmed the "same claim" analysis and interpretation of NYCCCA § 1808. Moreover, unlike the Plaintiff in *Tovar*, etc., it is undisputed here that Plaintiff is not asserting the same claim and is asserting different claims than in the small claims action, as also explained at pages 8-9 above.

In any event, any court decision at odds with statute at NYCCCA § 1808 is invalid and also unpersuasive – any court decision at odds with Plaintiff's position herein, would be at odds with the statute that clearly provides for claims in a subsequent action even "involving the same facts, issues and parties." Once again,

this Court has an obligation to follow the statute as written by the legislature but has no obligation to follow decisions of lower or different courts as to New York law.

3. DEFENDANT'S RELIANCE ON THIS COURT'S DECISION IN PARAMOUNT PICTURES, ACTUALLY AND STRONGLY SUPPORTS PLAINTIFF'S INTERPRETATION OF NYCCCA § 1808

Realizing that at most, only the same or identical claim is precluded in a subsequent action under NYCCA § 1808, Defendant tries to argue for the first time in this case that "same" does not mean same or identical and states as follows (Def. Br. 7):

> This Court's decision in Paramount Pictures Corp. v. Allianz Risk Transfer AG, 31 NY3d 64, 73 [2018] recognized that the "modern notion of res judicata has called for a broadened standard for determining whether two claims … are the "same" for purposes of claim preclusion." Id. at 77. Thus, "same claim" does not mean "identical claim" but includes claims arising out of the same transactions or occurrences

In a sense the above argument by Defendant does not introduce anything new because the traditional res judicata applied by Defendant and the district court in this case covered claims that could have been brought which are defined as "claims arising of the same transactions or occurrences," or based on the same facts, issues etc. and which we have addressed at length in the context of NYCCCA § 1808 which allows such claims in a subsequent action.

Nonetheless, this Court's decision in *Paramount Pictures* is very helpful to Plaintiff for several other compelling reasons. At the outset, this Court's explanation of the history of res judicata and how it has expanded and changed over time is one that is not often found and reflected in many cases, but is extremely helpful in further sorting out the issues herein. This Court in *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 74–75, 96 N.E.3d 737, 744–45 (2018), stated in relevant part as follows:

> For purposes of res judicata, case law focused on the precise "cause of action" asserted in the two suits … and, guided by the aim of pleading—"to frame one single legal issue"—that phrase came to have "a very narrow meaning." Indeed, "in the days when civil procedure still bore the imprint of the forms of action and the division between law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant"… These narrow conceptions of a "claim" limited the effects of res judicata, enabling piecemeal litigation with minimal risk of preclusion

It is precisely 'these narrow conceptions of a "claim"' that were adopted by the legislature and which "limited the effects of res judicata, enabling piecemeal litigation with minimal risk of preclusion," for very good reason given the goal set forth in the legislative history to "protect the parties from any unforeseen consequences of the small claims proceeding." New York Bill Jacket, 2005 A.B. 4320, Ch. 443.

We can confirm the very narrow view taken by the legislature of res judicata in the context of NYCCCA § 1808 by examining the cases cited in the legislative history such as *64 W. Park* – rejecting res judicata as to similar and related claims based on the same facts, transactions or series of transactions, and apply res judicata only in situations where the claims in the two actions were "virtual carbon copies," where the "underlying grounds alleged … are identical in both pleadings," where "the dollar damage claimed is exactly the same" and where "No additional factors or elements were added in the later claim." None of these requirements for res judicata under NYCCCA § 1808 are met in this case. In fact, for purposes of this appeal and the certification, it is undisputed that the federal and state statutory claims in this action are not the same as the claim in the small claims action, as also explained at pages 8-9 above.

Significantly, the offset provision is one of the most powerful indicators that the legislature intended to limit res judicata under NYCCCA § 1808 to only the exact same or identical claims. The offset provision would only apply in situations involving duplicate recovery – where claims based on the same harm but under different laws/statutes and legal theories. It appears that Defendant was unable to provide an example of where the offset provision would apply to offset duplicate recovery – because Defendant's analysis is erroneous. However, one such example is where a failure to pay overtime wages violates federal, state and local laws

which provide for slightly different but very meaningful recoveries, recovery periods, burdens of proof, rules of evidence etc. – NYCCCA § 1808 would allow a federal claim for overtime where duplicate recovery is offset by any judgment in small claims court on a state overtime claim based on the same violation or harm (i.e. failure to pay 1.5 times the regular rate for weekly hours over 40) – as is routinely done by judges after trials in wage and employment cases. Even though a subsequent claim for duplicative recovery is allowed under NYCCCA § 1808 subject to the setoff, Plaintiff's arguments are even stronger here, because we don't even have any duplicate recovery in this case given that the harms/damages under the wrongful termination claim in small claims court are different than the harms/damages under the federal and state statutory claims in this action.

Notably, the legislature is free to adopt whatever form of preclusion it chooses, and it can even choose a form of res judicata that existed in 1855 even if that is different from current forms of judicially created res judicata. Similarly, the legislature is free to allow claims that would otherwise be precluded by res judicata or collateral estoppel and it did so in this case by adopting language in NYCCCA § 1808, which allows claims in a subsequent action "involving the same issues, facts and parties," also which clearly limited the effects of traditional res judicata.

4. DEFENDANT FAILS TO UNDERSTAND THE CONNECTION BETWEEN COLLATERAL ESTOPPEL AND CLAIMS, ESPECIALLY AS USED IN THE LEGISLATIVE HISTORY

Defendant invokes collateral estoppel and argues as follows (Def. Br. 4-5):

> This alteration of statutory language intentionally rejected any limit on the res judicata effect of small claims court judgments, while continuing to impose limits on the collateral estoppel effect of those judgments. This intent is explicitly confirmed in the Bill Summary:
>
> > Clarifies that small claims judgments and local commercial claims judgments are res judicata, but shall not have collateral estoppel or issue preclusion effect in any subsequent proceeding.
>
> New York Assembly Bill Summary, 2005 A.B. A4320 (emphasis added). Thus, today, res judicata applies equally to all judgments in New York courts

We address this argument at this point because it builds on the arguments above. In so arguing, Defendant failed to recognize that the legislature is free to create its own form of preclusion that does not fit into the traditional res judicata and collateral estoppel labels. Indeed, in the pre-2005 version of NYCCCA § 1808, the legislature created a form of res judicata that was clearly limited to only the amount, and in the post-amendment version, the legislature limited res judicata to situations involving the exact same or identical claim as reflected in the legislative history and the case cited therein and by including text in NYCCCA § 1808 that allowed a subsequent action even "involving the same facts, issues and parties."

More significantly, Defendant fails to recognize the connection between collateral estoppel and claims. In this regard, Defendant merely repeats the general

statement that collateral estoppel is about issue preclusion while res judicata is about claim preclusion and stopped there – Defendant stuck with its half-baked explanation and did not elaborate on the workings of collateral estoppel which would have exposed the fatal flaw in Defendant's argument and position. Specifically, collateral estoppel is used to defeat *claims* so even if the subject language is referred to as collateral estoppel, by eliminating collateral estoppel the legislature was necessarily allowing claims – in a subsequent action, even "involving the same facts, issues and parties." NYCCCA § 1808.

In *McGee v. J. Dunn Const. Corp*., 54 A.D.3d 1010, 864 N.Y.S.2d 553 (2008), whose ruling was affirmed by the Second Department. In *McGee v J. Dunn Const. Corp.,* No. 7340/2006, 2007 WL 6179709 (N.Y. Sup. Ct. Sep. 24, 2007), the motion court denied the motion to dismiss 'pursuant to the doctrine of res judicata," and explained that "Uniform Justice Court Act §1808 does not allow for either "issue preclusion" or "collateral estoppel" of *separate claims* arising from the same transactions between the parties." Also, as evidenced by the NYPIRG letter in the legislative history, those involved in the amendment fully understood that the use of the terms collateral estoppel and res judicata in the legislative history allowed claims in a subsequent action even "involving the same facts, issues and parties" and allowing for a setoff as to these subsequent related claims based on the amount of the small claims judgment. NYCCCA § 1808. Defendant

attempts to dismiss NYPIRG as "one group lobbying in favor of that statutory amendment" (Def. Br. 13), but even a lobbyist can read clear statutory text and legislative history and conclude like the Second Circuit did, that the statute's "plain meaning thus strongly supports Simmons's interpretation." (A142).

Ironically, Defendant itself defined res judicata in its Second Circuit brief as involving relitigating of issues when it stated in relevant part as follows (A52):

> Claim preclusion bars "relitigating issues that were or could have been raised" in an earlier action between the parties. Kremer, 456 U.S. at 466 n.6. Simply stated, it prevents claim splitting or litigating claims piecemeal.

As such, not everyone use the terms res judicata and collateral estoppel to mean the same thing and this is precisely why it is important to understand terms such as collateral estoppel and res judicata from the point of view of the person or entity using them and not from your own point of view, especially where the terms have evolved overtime time and are also used interchangeably. It is also precisely why we should stick to the statutory text which we are legally required to follow and stay away from misleading and confusing labels which are wholly unnecessary. As the Second Circuit concluded, the statute's "the statute's "plain meaning thus strongly supports Simmons's interpretation" (A142), and requires a ruling in Plaintiff's favor on all issues presented herein.

III. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Honorable Court adopt Plaintiff's interpretation and answers the certified question as follows and grant Plaintiff such other, further and different relief in her favor as the Court deems just and proper:

Answer: Preclusion under New York City Civil Court Act ("NYCCCA") § 1808 is unique and does not fit within the traditional res judicata and collateral estoppel labels. NYCCCA § 1808 only precludes Plaintiff from asserting in this action, the same claim she brought in the prior small claims court action. A separate or different claim under NYCCCA § 1808 can involve "the same facts, issues and parties" as the small claims court action - as set forth in the text of NYCCCA § 1808. By extension and even more so, a separate or different claim under NYCCCA § 1808 can also involve "the same transaction, occurrence or employment relationship" – a transaction/occurrence can have many different facts/issues, and an employment relationship can span many years and have many different transactions/occurrences.

Dated: Queens Village, New York
September 8, 2020

Respectfully submitted,

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Dated: September 8, 2020

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