19-438

United States Court of Appeals
for the Second Circuit

CHARLENE SIMMONS,

Plaintiff-Appellant,

-against-

TRANS EXPRESS INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (Brooklyn)

BRIEF FOR PLAINTIFF-APPELLANT

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I. JURISDICTIONAL STATEMENT

Plaintiff-Appellant Charlene Simmons ("Plaintiff," "Appellant" or "Simmons") filed this action in the district court on October 24, 2018, against Defendant-Appellee Trans Express Inc. ("Defendant," or "Appellee"). The district court had subject matter jurisdiction over Plaintiff's FLSA claims under the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et Seq., and pursuant to 28 U.S.C. §§ 1331, 1337 and supplemental jurisdiction over Plaintiff's state law claims. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Plaintiff timely filed her notice of appeal (A36-A37)[1] on February 19, 2019 from the order of the Hon. Eric N. Vitaliano, dismissing the complaint (A22-A34), entered in favor of Defendant, in the United States District Court, Eastern District of New York, on February 7, 2019 – the judgment was entered on February 20, 2019. (A35). Plaintiff's appeal is from a final judgment (A35) and order (A22-A34) that dismissed all her claims.

[1] "A" in this and other citations used in this brief refers to the joint appendix. For example, "A39" refers to page 39 of the joint appendix.

II. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Whether the lower court erred in dismissing the factually and legally different federal and state statutory claims in this action, based on an aspect of traditional res judicata that has been eliminated by the N.Y. City Civil Ct. Act § 1808 with regard to judgments of small claims court, and which even allows a "subsequent … action … involving the same facts, issues and parties," and which specifically provides a setoff for any duplicative recovery instead of preclusion?

ISSUE 2: Whether the federal and state statutory overtime and penalty claims in this action are barred by res judicata bars because of a prior wrongful termination claim in small claims court, where the claims in this action were never asserted in the prior action, where the small claims court lacked subject matter jurisdiction to handle the claims in this action and where the claims in this action are not based on the same harm/transaction as the claim in the prior small claims court action?

Standard of Review ("SOR"): De novo.

ISSUE 4: Whether res judicata is a valid defense to an FLSA claim where this Court has long ago declared in Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2d Cir. 1959), that the FLSA "lies in an area where agreements

and other acts that would normally have controlling legal significance are overcome by Congressional policy."

Standard of Review: De Novo

III. STATEMENT OF FACTS/STATEMENT OF CASE

Plaintiff Charlene Simmons ("Plaintiff," "Appellant" or "Simmons"), was employed by Defendant Trans Express Inc ("Defendant," "Appellee" or "Trans Express"), from April 2012 to in or around April 2013 and then again from in or around June 2016 to on or about June 18, 2018 when she was taken of the schedule by Defendant and terminated[2]. (A6, ¶ 12). During her employment with Defendant Plaintiff Simmons helped to transport customers within New York City, and more specifically, within Queens, New York – to and from Resorts World Casino in Queens. (A6, ¶ 11).

On or about June 18, 2018, Plaintiff was taken off the schedule and effectively terminated by Defendant – she was not paid any wages at all after this point. (A6, ¶ 12). Believing her termination was wrongful and faced with the resulting immediate and complete loss of her regular non-overtime wages, Plaintiff filed an action in New York City Small Claims Court, Queens County to recover her regular weekly, non-overtime wages which were lost as a result of her termination. The district court set forth the facts concerning the small claim court action as follows (A23):

> Prior to bringing this lawsuit, it is undisputed, in August 2018, Simmons filed suit against Trans Express in small claims court, seeking "monies arising out of nonpayment of wages." Summons, Simmons v. Trans Express Bus Co., No. S.C.Q. 2847/2018 (N.Y. Civ.

[2] Given the nature of the case, some analysis is required to ascertain the relevant and material facts and information

> Ct. Aug. 10, 2018). On September 4, 2018, after trial before a small claims arbitrator, Simmons was awarded a $1,000 judgment, along with a $20 disbursement. Notice of Judgment, Simmons (N.Y. Civ. Ct. Sept. 4, 2018). This judgment was satisfied on September 28,2018. Notice of Payment, Simmons (N.Y. Civ. Ct. Oct. 15, 2018).

Notably, the district court described the facts in the preceding blockquote as "undisputed" but not any other facts, information or allegation concerning the small claims court action. For example, the district court did not label as "undisputed" any allegation that Plaintiff asserted overtime claims in small claims court – such a dispute of such a material fact would require a denial of the pre-answer motion to dismiss based on res judicata – a fact-intensive affirmative defense that Defendant has the burden of proving.

The small claims judgment contains the notation "for unpd OT Etc." (A20), which the district court speculated meant "unpaid overtime" (A29), although the district court did not state further as to whether this purported overtime was for straight time overtime, overtime for working more than eight (8) hours a day, overtime for working on holidays/Sundays etc. – all of which are very different from the statutory overtime wages sought in this case – overtime wages of at least 1.5 times the regular rate for weekly hours over 40. (A4-A12).

The district court resorted to speculation and guesswork, because it seems that unlike every other cited case involving res judicata, there was no record of the the small claims court proceeding here – because the case was not handled by a

judge. The small claims paperwork notes that review of small claims judgements are not allowed because there is no transcript of the proceedings (A19) – this is a recognition of an obvious and practical problem that prevented the district court from performing an intelligent review of the small claims proceedings.

Rather than speculating that the notation in the judgment "for Unpd OT Etc." means "unpaid overtime" which it may or may not mean after proper inquiry which may or may not be possible, it would have been more accurate for the district court to recognize the obvious fact that the scant record is vague, ambiguous and inconclusive as to what claims were asserted below, or at minimum, there are genuine disputes of material facts, and as such, the Court cannot conclude that the Defendant has carried its burden of proving the res judicata defense at the motion to dismiss stage. See i.e. *Thompson v. Cty. of Franklin*, 15 F.3d 245, 253–54 (2d Cir. 1994)("Practical considerations, moreover, counsel against our review of the res judicata issue at this time. Res judicata inquiries often require a detailed analysis of a developed record.").

When confronted with personalized notations/abbreviations in documents, the general and logical practice in litigation is to ask the author with personal knowledge what the notations/abbreviations mean, the basis for them, etc. If obtaining such factual explanations is not possible, then the notations cannot be relied upon even if we are tempted to guess their meaning and have a strong desire

to do so.

Very significantly, even though the district court may be allowed to take judicial notice of the small claims court judgment, it is not allowed to take judicial notice of the meaning or the "truth of the matter" of a highly personalized notation/abbreviation contained in such judgment – especially the handwritten one here that can be characterized an undecipherable. As such, the small claims judgment in this action does not constitute a valid basis for concluding what claims were asserted in the small action.

The legal standard on a motion to dismiss also governs what are considered facts for purposes of deciding the motion to dismiss in this case. In this regard, the Second Circuit in *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 498–99 (2d Cir. 2014), stated in relevant part as follows:

> We review de novo the dismissal of a complaint under Rule 12(b)(6), accepting all allegations in the complaint as true and drawing all inferences in favor of the plaintiff. Walker v. Schult, 717 F.3d 119, 124 (2d Cir.2013).

While an affirmative defense such as res judicata can be technically made under 12(b)(6), that is only possible "if its availability appears from the plaintiff's pleadings." *Southard v. Southard*, 305 F.2d 730, 732, fn 1 (2d Cir. 1962). A plaintiff is not required to plead facts negating the res judicata affirmative defense which is generally the subject of a FRCP 12(c) motion after an answer is filed and where all the necessary and relevant information is available. *Mosely v. Bd. of*

Educ. of City of Chicago, 434 F.3d 527, 533 (7th Cir. 2006).

Here, for purposes of the motion to dismiss, the district court was required to take as true, Plaintiff's representations that she did not assert an overtime claim in the prior small claims action but instead asserted a claim for wrongful termination for damages in amount of $5,000 flowing from the wrongful termination – the maximum amount of damages the small claims court has subject matter to award. The duty and obligation to accept Plaintiff's representations as true for purposes of Defendant's motion to dismiss is especially great because Plaintiff was not required to plead facts in the complaint negating the res judicata defense and on the motion she is forced to respond to documents outside the pleadings which are subject to interpretation and explanation especially in the absence of a record of the proceedings in the prior small claims action. If the district court wished to dispute Plaintiff's personal knowledge, representations and credibility, it could have converted the motion to one for summary judgment where appropriate or allow for discovery and jury trial to resolve the factual disputes – something it did not do.

Additionally, when all reasonable inferences are drawn in Plaintiff's favor as the Court was required to do, we must conclude that Plaintiff asserted a wrongful termination claim in small claims court and not an overtime claim for several reasons. First, in her small claims complaint as the district court itself noted above, Plaintiff sued to recover "monies arising out of nonpayment of wages." (A18).

Notably, Plaintiff sued for nonpayment of wages as opposed to underpayment of wages – a distinction that is powerfully consistent with her termination claim where Defendant was not paying her any wages at all – as opposed to an overtime claim where she is alleging underpaying of wages because she was paid for all hours but at a lower rate in violation of law. The district court itself framed the current overtime claim as an "underpayment" as opposed to a "nonpayment" claim in footnote 3 of its decision. (A29). Second, there is no testimony from anyone with personal knowledge, contradicting Plaintiff as to the claims and proceedings in small claims court. Third, discovery will confirm that Plaintiff did not even know about the overtime provisions of the FLSA and NYLL at the time she filed her small claims action and could not possibly have asserted and did not assert overtime claims under the FLSA and NYLL in the small claims action. Fourth, the notation/abbreviation "for unpd OT Etc." is vague and ambiguous at even though it may or may not mean unpaid overtime - it is not uncommon for people to associate "unpaid wages" with the more popular "unpaid overtime wages" and to use the terms interchangeably especially where such a distinction did not appear to matter in the context of the informal procedures of small claims court. Fifth, the use of the term "Etc" in the judgment may indicate additional relief such as emotional distress and other damages which are typically associated with a wrongful termination claim.

There is no claim or argument that Plaintiff's manual worker claims (bi-weekly instead of weekly pay – NYLL § 191(1)(a)(i)), and claims for wage notice and wage statement violations of NYLL § 195 were asserted in the prior small claims action – it appears that the district court did not address these claims.

After consulting an attorney and learning more about her rights, Plaintiff on October 24, 2018, Plaintiff filed the instant action to recover overtime wages under the FLSA and NYLL as well as claims for violation of the wage notice, wage statement and manual worker requirement of the NYLL 195 and manual worker claims for violation of NYLL 191(1)(a)(i). (A4-A12). Notably, the complaint and the judgment in the small claims action, do not even mention any of the statutory claims in this action. (A18-A20). Nonetheless, Defendant served a motion on December 7, 2018 to dismiss the complaint purportedly based on the res judicata affirmative defense but which in fact was the collateral estoppel affirmative defense – a defense that the lower court conceded would be prohibited by New York City Civil Court Act ("NYCCCA") § 1808.

Nonetheless, the district court granted defendant's motion to dismiss on February 7, 2019. (A22-A34). Plaintiff filed his notice of appeal on February 19, 2019 (A35), and this brief now constitutes the perfection of the appeal.

IV. SUMMARY OF ARGUMENTS

On October 24, 2018, Plaintiff filed the instant action asserting claims for overtime wages under the FLSA and NYLL, claims to recover penalties for violations of the wage notice and wage statement requirements of NYLL § 195, and manual worker claim to recover liquidated damages and interest for violations of the weekly payment requirement of NYLL § 191(1)(a)(i). (A4-A12). On February 7, 2019, the district court granted Defendant's motion to dismiss the complaint in its entirety, based on the purported res judicata affirmative defense. (A23-A34). The district court should be reversed for several compelling reasons.

First, the district court's dismissal order is based on an aspect of traditional res judicata that was specifically eliminated by New York State statute – NYCCCA § 1808. In this regard, traditional res judicata bars a claim in a subsequent action that is "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." As such, even though the statutory overtime, wage notice, wage statement and manual worker claims in this action involve different facts and issues than termination claim in the small claims action, the claims in this case would not be barred by res judicata even if they "involve[ed] the same facts, issues and parties,"

in light of NYCCCA § 1808.

The district court recognized that NYCCCA § 1808 did in fact limit the preclusive effect of small claims court judgments but argued that only the defense of collateral estoppel or issue preclusion is prohibited and that because the Defendant labelled its defense as res judicata and not collateral estoppel, traditional res judicata rules should apply[3]. However, whether we call the limitations on res judicata imposed by NYCCCA § 1808, limited or modified res judicata or collateral estoppel, the district court fatally erred by applying traditional res judicata without the significant limitations imposed by NYCCCA § 1808.

Second, even if we applied traditional res judicata without the restrictions imposed by NYCCCA § 1808, the res judicata affirmative defense would still fail. In this regard, it is well recognized that res judicata does not apply to claims that could not have been brought in the prior action because the court in the prior action lacked subject matter jurisdiction to handle the claims. Here, it is undisputed that the small claims court in the prior action had subject matter jurisdiction of up to $5,000 and asserting the statutory claims in this action in the prior small claims action would have exceeded the subject matter jurisdiction of the small claims court.

Similarly, the claims in this action are not barred even by traditional res

[3] As we also explain below, Defendant's motion also fails under traditional res judicata defense.

judicata because they are not "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). As explained in Statement of Facts/Statement of Case (SOF/SOC) above, the overtime, wage notice, wage statement and manual worker claims here are based on different harms and different facts and require different proofs than those upon which the small claims termination claim is based.

Third, Res Judicata is not a valid defense to the FLSA and NYLL claims in this case. See i.e. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959)("Appellant's argument of estoppel ignores that this case lies in an area where agreements and other acts that would normally have controlling legal significance are overcome by Congressional policy."). See also, *Cheeks v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 (1946)

V. ARGUMENT

1. NYCCCA § 1808, ELIMINATED THE VERY ASPECT OF TRADITIONAL RES JUDICATA UPON WHICH THE LOWER COURT'S DISMISSAL ORDER IS BASED, BY SPECIFICALLY ALLOWING A SUBSEQUENT ACTION "INVOLVING THE SAME FACTS, ISSUES AND PARTIES" – EVEN THOUGH THE CLAIMS IN THIS CASE ARE BASED ON DIFFERENT FACTS AND ISSUES – AN EVEN MORE COMPELLING SITUATION FOR PLAINTIFF

(A) THIS ACTION DOES NOT INVOLVE THE "SAME CLAIM" AS THE PRIOR ACTION IN SMALL CLAIMS COURT

A fatal flaw in the district court's decision and ruling is the failure to properly and fully account for and implement the limitations on res judicata imposed by New York City Civil Court Act ("NYCCCA") § 1808, which even allows subsequent litigation of claims that arise out of the same or related facts with claims in the prior action and 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.

In *Farbstein v. Hicksville Pub. Library*, 323 F. Supp. 2d 414, 423 (E.D.N.Y. 2004), the federal district court explained the narrower form of res judicata that applies to New York small claims court judgments and stated in relevant part as follows:

> In the instant case, Plaintiff's claims were previously adjudicated and dismissed by a small claims court. The parties dispute the precise character of res judicata that may attach to such a small claims determination. Upon review of the case law, the Court concludes that "a claim brought to and decided in small claims court will be given res judicata effect where the party who was adversely effected by the prior judgment seeks to relitigate the exact same claim in subsequent proceedings." *Chrzanowski v. Lichtman,* 884 F.Supp. 751, 756 (W.D.N.Y.1995). This is narrower than the general scope of res judicata. *See L–Tec Elecs.,* 198 F.3d at 88. Upon this narrower principle, the Court concludes that Plaintiff is not seeking to litigate the exact same claims as were litigated in the small claims action. In support of this conclusion, the Court notes that the small claims complaint based the action upon a false complaint to the police and the fact that epithets were used. While this incident, i.e. the December 11, 1996 incident at the library, provided the genesis for Plaintiff's complaint, the Court concludes that it does not encompass "the exact same claim." Among other differences, the Court notes that Plaintiff bases his claim upon a conspiracy to deny him access to the library due to his religious affiliation, not upon any epithets or the complaint to the police. As such, the Court declines to apply res judicata under these circumstances.

More recently in 2018, the federal district court in *Walters v. T&D Towing Corp.*, No. 17CV0681JSAKT, 2018 WL 1525696, at 5 (E.D.N.Y. Mar. 28, 2018), also interpreted NYCCCA § 1808 as limiting the application of res judicata to only situations where the subsequent action involves the "exact same claim" as the prior small claims action. In fact, the district court in this very action seem to confirm this interpretation when it quoted from the Bill Jacket of the 2005 amendment to NYCCCA § 1808 and stated in relevant part as follows (A25):

> The Legislature noted that "[t]he courts have consistently held that a small claims judgment is res judicata when the *same claim* is filed in another court"

As in *Farbstein*, where the court "upon review of the case law" concluded that small claims judgments only have res judicata effect as to "the *exact same* claim in subsequent proceedings," the NYS legislature, according to the district court itself, also reviewed the case law and reached the same conclusion that res judicata only applies to small claims judgment "when the ***same*** claim is filed in another court" (A25), and that the 2005 amendment to NYCCCA § 1808, was intended to give effect to this more limited form of res judicata or what can also be called collateral estoppel.

Notably, "exact same claim" and "same claim" are different from "related" or "similar" claims. Here, as explained in the SOF/SOC above, the statutory claims for overtime wages under the FLSA and NYLL, the NYLL § 195 claims for wage notice and wage statement violations, and the manual worker claims under NYLL § 191(1)(a)(i) are different from the claim for wrongful termination asserted in the prior smalls claims action by Plaintiff. Any attempt to argue that overtime claims were asserted in the small claims action would be without valid legal basis given the deficient record of the proceedings below and at minimum, would create genuine disputes of material facts requiring a denial of the motion to dismiss. In any event, even if the federal overtime claims shared some common issues with any alleged overtime claim in the small claims action (there was no such overtime claim in the prior action), the statutory claims in this action would still qualify as

different and independent claims because judgment for damages can be entered on each such claim under the different statutes (FLSA and NYLL) and the jury would be instructed to award damages on each such claim on which the Plaintiff prevails with an appropriate set off to be made afterward. See i.e. *Hengjin Sun v. China 1221, Inc.*, No. 12-CV-7135 (RJS), 2016 WL 1587242, at 2 (S.D.N.Y. Apr. 19, 2016) ("the Court will award the full amount of Plaintiffs' FLSA damages, and, in order to calculate Plaintiffs' NYLL damages, the Court will subtract the total FLSA damages award from the total NYLL damages award."). The district court appear to recognize this important argument but only addressed it in a footnote in relevant part as follows (A29-A30), fn 3):

> Plaintiff attempts to distinguish Tovar by noting that she now asserts claims under FLSA and NYLL but did not assert such claims in small claims court. Put transparently, she contends that she is now seeking relief not for underpayment during a different period of time but rather for violations of different statutes. This does nothing to save plaintiffs case because res judicata "bar[s] claims arising from the same transaction even if brought under different statutes," Mayle V. Felix, 545 U.S. 644, 673, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) (quoting Kremer v. Chem. Constr. Corp., 456 U.S. 461,482 n.22, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)). More precisely, in seeking to avoid the res judicata bar, the question is not whether Simmons did or did not advance all of her claims in the small claims proceeding. The question is whether she could have. Plaintiff offers no reason why, and the Court is aware of none, other than her own election of remedies, she could not have done so.

The district court's reliance on *Mayle V. Felix*, 545 U.S. 644, 673 (2005), for the proposition that 'res judicata "bar[s] claims arising from the same transaction

even if brought under different statutes," is grossly misplaced. Notably, it appears that the district court relied on the dissenting opinion in *Mayle*. Even if the district court meant to focus on the footnote in *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461,482 n.22 (1982) which was cited by the dissent in *Mayle*, *Kremer* and related authorities actually support Plaintiff in the context of this case, especially in light of NYCCCA § 1808.

At the outset, what the Supreme Court applied in *Kremer* is a narrower species of res judicata known as collateral estoppel. We know this because the Supreme Court in *Kremer* framed the issue as whether *Kremer* was prevented "from relitigating the same *question* in federal court," as opposed to the same *claim*. In fact, throughout the *Kremer* decision, the Supreme Court referred to the New York discrimination claim and federal Title VII discrimination claim as separate and different claims but noted they share a common issue or question - whether the termination was discriminatory - that because plaintiff in *Kremer* was prevented from relitigating the discrimination issue, his federal Title VII claim would necessarily fail. The district court appear to argue something similar here - that Plaintiff is prevented from relitigating the overtime issue in this case and as such, her statutory overtime claims in this case would fail – this however, is a collateral estoppel defense/argument that would be prohibited even under the district court's interpretation of NYCCCA § 1808. (A25).

There are other mentions of collateral estoppel in *Kremer*, 456 U.S. at 480–81 - i.e. 'We have previously recognized that the judicially created *doctrine of collateral estoppel* does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue.' By way of further confirmation, the Supreme Court in *Kremer*, 456 U.S. at 481, fn 22, distinguished between res judicata and collateral estoppel and stated in relevant part as follows:

> It may be that petitioner would be precluded under res judicata from pursuing a Title VII claim. However that may be, it is undebatable that petitioner is at least estopped from relitigating the issue of employment discrimination arising from the same events.

In other words, the Supreme Court in *Kremer*, 456 U.S. at 481, fn 22, expressed skepticism and uncertainty that traditional res judicata would apply but found that it was certain and "undebatable" that collateral estoppel applied to the fact pattern there where statutory claims were subsequently brought but barred based on issues previously litigated. As such, even assuming arguendo that an overtime issue material to the overtime claims in this action were litigated in the small claims action, such a fact pattern would amount to collateral estoppel – a defense the district court agreed is not available in light of NYCCCA § 1808.

Courts that apply res judicata to subsequent statutory claims based on facts/issues purported litigated in a prior action, do not do so on grounds that the subsequent claims are the same or identical. They do so on the basis that the claims

are similar enough and that the effect would be the same whether res judicata or its narrower species of collateral estoppel is applied – unlike here where collateral estoppel and traditional res judicata are not available as defenses in light of NYCCCA § 1808. Strictly speaking, however, and more accurately, those courts are actually applying collateral estoppel and not res judicata. Likewise, what was labelled by Defendant in this case as res judicata was actually a narrower form of res judicata or collateral estoppel that the district court failed to recognize and address – a defense prohibited by NYCCCA § 1808 - Defendant's motion to dismiss should have been denied.

The practice of conflating res judicata with collateral estoppel was observed by the U.S. Supreme Court itself in *Allen v. McCurry*, 449 U.S. 90, 94, FN 5 (1980), when it stated in relevant part as follows:

> The Restatement of Judgments now speaks of res judicata as "claim preclusion" and collateral estoppel as "issue preclusion." Restatement (Second) of Judgments § 74 (Tent. Draft No. 3, Apr. 15, 1976). Some courts and commentators use "res judicata" as generally meaning both forms of preclusion.

The New York Court of Appeals in *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500–01, 467 N.E.2d 487, 490 (1984), also noted that "the doctrine of collateral estoppel [is] a narrower species of *res judicata.*" As such, in reading the cases, one has to be alerted that courts may be using the terms res judicata and collateral estoppel interchangeable and incorrectly. Once again, what Defendant in

this case labelled as a res judicata defense was actually a collateral estoppel defense that is prohibited by NYCCCA § 1808.

(B) THE STATUTORY LANGUAGE ITSELF CONFIRM THAT PLAINTIFF IS RIGHT AND THE DISTRICT COURT IS WRONG

The district court's reasoning and ruling conflict with the plain language of NYCCCA § 1808 which specifically allows a small claims plaintiff to bring related or similar claims in a subsequent action "involving the same facts, issues and parties" In other words, even if Defendant is correct (it is incorrect) that the overtime issue was litigated as part of the claim in small claims court, NYCCCA § 1808 specifically allows Plaintiff to bring a claim in a subsequent action involving the same issues and parties and even the same facts. The situation here is even more compelling in Plaintiff's favor because the overtime and other claims in the current action are based on issues and facts that are different from the wrongful termination claim in the prior small claim action as set forth in the SOF/SOC above. If Defendant and the district court are correct, there will never be a situation where a small claims plaintiff can bring a subsequent claim "involving the same facts or issues" as in the prior action, and the statute at NYCCCA § 1808 would be meaningless. Rather than NYCCCA § 1808 eliminating an aspect of traditional res judicata, the district court turned the situation upside down and has in essence held that traditional res judicata has eliminated the central aspect and purpose of the

statute – the district court is obviously wrong and must be reversed.

(C) THE SET-OFF PROVISION OF THE STATUTE CONFIRMS THAT PLAINTIFF IS RIGHT AND THE LOWER COURT IS WRONG

The set-off provision of the statue at NYCCCA § 1808, provides powerful confirmation that the district court's interpretation of the statute to bar this action is erroneous. In this regard, NYCCCA § 1808 provides that a judgment obtained in a subsequent action "involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article." Such a reduction or set-off would only be warranted if the recovery in the subsequent action is duplicative of the recovery in the prior small claims action. In other words, the set-off provision of NYCCCA § 1808 confirms that a small claims plaintiff can bring claims in a subsequent action to even seek duplicative recovery. As such, assuming arguendo that the different statutory overtime claims in this action seek recovery that is duplicative of recovery in the small claims action, the claims in this action are not barred in light of NYCCCA § 1808 which would only require a set-off and not preclusion. Once again, however, the recovery of overtime wages, penalties, liquidated damages and interest sought in this action is different from the recovery under the wrongful termination claim in the prior small claims court action.

(D) THE STRUCTURE, PURPOSE AND INTENT OF SMALL CLAIMS COURT CONFIRM THAT PLAINTIFF IS CORRECT AND THE LOWER COURT IS WRONG

As the name suggests, small claims court is designed to handle small claims only - not big ones like we have in this case. This is precisely why New York statute at NYCCCA § 1808 specifically allows a small claims plaintiff to bring claims in a subsequent action "involving the same facts, issues and parties." This provision specifically and logically allows for plaintiffs not to bring all of their claims in small claims court given the $5,000 jurisdictional limit of that court, without the risk or penalty of forfeiting bigger and more important claims through res judicata. In other words, the purpose of NYCCCA § 1808 and small claims court is to allow for expedited recovery of small claims through the informal process of small claims court without an attorney, while preserving bigger statutory claims for other higher courts such as federal court that may require more elaborate discovery procedures, motion practice etc., and the help of counsel. This is a recognition that small claims court may be suitable for litigation of some claims but not others and that a small claims plaintiff should not be forced to choose between her claims or between courts. See i.e. *Katzab v. Chaudhry*, 48 A.D.3d 428, 849 N.Y.S.2d 804 (2008) (invoking N.Y. Uniform City Ct. Act § 1808 to reverse trial court's dismissal of complaint based on res judicata).

2. DEFENDANT'S PURPORTED RES JUDICATA DEFENSE FAILS BECAUSE THE CLAIMS ASSERTED BY PLAINTIFF IN THIS ACTION WERE NOT ASSERTED AND COULD NOT HAVE BEEN ASSERTED IN SMALL CLAIMS COURT

We have explained above that traditional res judicata does not apply in this case in light of NYCCCA § 1808. However, an essential element of traditional res judicata applied by the district court is that the claims in the subsequent action were or could have been asserted in the prior action. In applying traditional res judicata in this action, the district court noted at one point that, "the only point of contention is whether the claims asserted now were or could have been raised in the prior action." (A29). As we will explain further below, the statutory claims for over overtime wages, wage notice and wage statement penalties as well as the manual worker claims in this action were never asserted and could not have been asserted in the prior small claims action.

(A) THE FEDERAL AND STATE STATUTORY CLAIMS IN THIS ACTION WERE NEVER ASSERTED IN THE SMALL CLAIMS COURT ACTION

As set forth in the SOF/SOC above, the statutory claims under the FLSA and NYLL for overtime wages and the statutory claims under NYLL for penalties based on NYLL § 195 wage notice and wage statement violations, are different from the claim for wrongful termination asserted in the small claims court action and were never asserted in the small claims court action. Any attempt to dispute this point, would at minimum, create genuine disputes of material facts which

would warrant a denial of Defendant's pre-answer motion to dismiss based on the fact-intensive res judicata affirmative defense.

(B) THE FEDERAL AND STATE STATUTORY CLAIMS IN THIS ACTION COULD NOT HAVE BEEN ASSERTED IN THE PRIOR ACTION BECAUSE THE SMALL CLAIMS COURT LACKED SUBJECT MATTER JURISDICTION OVER CLAIMS EXCEEDING $5,000

It is well settled that even traditional res judicata does not require a plaintiff to raise claims in a prior action that the court in the prior action lacked the subject matter jurisdiction to handle – even if the claims in both actions stem from the same harm which is not the case here. In this regard, the New York Court of Appeals in *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349, 712 N.E.2d 647, 650, stated in relevant part as follows:

> Res judicata is inapplicable where the plaintiff "was 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 multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to seek that remedy or form of relief"

The district court in this action does not dispute that the NY Small Claims court in the first action did not have subject matter jurisdiction beyond Five Thousand Dollars ($5000) and that assertion in the small claims action of the claims in this federal action would have exceeded the subject matter jurisdiction of the small claims court which would have lacked the power to handle said claims. Nonetheless, the district court stated in relevant part as follows (A26):

> Plaintiff contends that res judicata does not apply because the small claims court was only empowered to award $5,000 in damages and the present action seeks greater relief. However, the Appellate Division rejected this precise argument in Chapman, where it held that a small claims judgment operated as a bar to a future action, "even though, were plaintiff to have brought and proven his claims in [state] Supreme Court in the first instance, he could have sought a larger award." Chapman, 150 A.D.3d at 647. The court explained that "plaintiffs could have pursued all relief in a single action in the Supreme Court, but opted instead to pursue the claim in the Small Claims Part of the Civil Court," and it refused to allow plaintiffs to escape the consequences of that decision. Id,

The district court's reliance on *Chapman v. Faustin*, 150 A.D.3d 647, 55 N.Y.S.3d 219, 220 (1st Dep't. 2017) is grossly misplaced for several compelling reasons. First, unlike *Chapman*, and as explained in the SOF/SOC above, we are not dealing with a situation here where the Plaintiff is trying to split the same claim across two actions/lawsuits. The claim Plaintiff brought in small claims court was one for wrongful termination and damages following plaintiff's termination – not the statutory overtime claims in this case for work done prior to her termination.

Second, any attempt to dispute this point, would at minimum, create genuine disputes of material facts which would warrant a denial of Defendant's pre-answer motion to dismiss based on the fact-intensive res judicata affirmative defense. This is especially true where, unlike *Chapman*, there is no record here of the proceedings in the first action that can tell use with reasonable reliability what claim(s) were asserted in the first action.

Third, the district court appear to argue that the subject matter exception to res judicata does not apply when damages are the issue. However, the $5,000 limitation is an essential part of the subject matter jurisdiction of small claims court and just as important as other limitations such as those dealing with declaratory and injunctive relief. Any attempt to slice and dice subject matter jurisdiction in this way has no basis in law and must fail. Similarly, the subject matter jurisdiction exception to res judicata does not require a plaintiff to forego small claims court if that court has subject matter jurisdiction over some but not all claims – that would in essence destroy the subject matter jurisdiction exception. See also *Pike v. Freeman*, 266 F.3d 78, 90–92 (2d Cir. 2001)("[S]howing that the applicable procedural rules did not permit assertion of the claim in question in the first action of course also suffices to show that the claim is not barred in the second action.").

Fourth and very importantly, *Chapman* did not involve wage claims. In this regard, any argument that a Plaintiff waives FLSA wages in order to get into small claims court, especially on unrelated claim such as wrongful termination, easily fails. This is because it is well settled that overtime wages, especially overtime wages under the FLSA cannot be waived privately. See *Cheeks v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 (1946); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959).

(C) THE FEDERAL AND STATE STATUTORY CLAIMS IN THIS ACTION COULD NOT HAVE BEEN ASSERTED IN THE PRIOR ACTION IN SMALL CLAIMS COURT BECAUSE THEY DO NOT ARISE FROM THE SAME TRANSACTION/HARM AS AND ARE NOT SUFFICIENTLY RELATED TO THE SMALL CLAIMS COURT CLAIM

Even if this case did not involve a small claims court judgment as to which res judicata is limited by and other legal principles, the "res judicata" defense would still fail because the claims in this action do not arise from the same transaction/harm, as the claim in the small claims court action. In *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001), the Second Circuit explained when claims that were not asserted should have been asserted in the prior action under traditional res judicata doctrine and stated in relevant part as follows:

> Whether a claim that was not raised in the previous action could have been raised therein "depends in part on whether the same transaction or connected series of transactions is at issue, and whether the same evidence is needed to support both claims." Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 (2d Cir.1997) (internal alterations and quotation marks omitted). "To ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " Id. (quoting Restatement (Second) of Judgments § 24(b)). As this "same transaction" test indicates, the "could have been" language of the third requirement is something of a misnomer. The question is not whether the applicable procedural rules permitted assertion of the claim in the first proceeding; rather, the question is whether the claim was sufficiently related to the claims

> that were asserted in the first proceeding that it should have been asserted in that proceeding.
>
> … Consequently, the question is whether these claims should have been raised in the arbitration, that is, whether they are based on the same "transaction" as were the claims asserted by Pike in the arbitration.

Nonetheless, in concluding that the claims in this action should have been raised in the prior small claims action, the district court stretched the definition of transaction/harm beyond legal and logic limits and stated in relevant part as follows (A29):

> Because plaintiff's present claims, like her claims in small claims court, arise from her employment at Trans Express and had accrued prior to the small claims proceeding, they could have been raised in the prior proceeding and are barred by res judicata.

At the outset, *Chapman*, upon which the district court relied, did not involve an employment relationship and did not hold that all harms that occur during the employment relationship are the "same harm" and should be asserted at the same time in small claims court or be forfeited under the res judicata doctrine - as the district court erroneously ruled in this case. Significantly, the court in *Chapman* upheld a res judicata dismissal because it concluded it was dealing with the "same harm and arising out of the same or related facts," because "The instant action, like the small claims action brought by plaintiff Robert Chapman, seeks relief for defendants' alleged failure to render proper accounting services." By contrast, as explained in the SOF/SOC, the claim asserted by Plaintiff Simmons in the small

claims action was in essence a wrongful termination claim as opposed to the statutory claims in this action for overtime wages, wage notice and wage statement penalties, and manual worker damages. The harms and facts here are very different. Unlike the termination claim where the harm is the wrongful termination of Plaintiff plus damages based on facts after the employment ended, the harm as to the overtime claims involve failure to pay at least 1.5 times the regular rate for weekly hours over 40 based on facts prior to the termination relationship. Likewise, the wage notice and wage statement claims are based on different harms - failure to provide the wage notice and wage statement required by NYLL § 195 at the start of and during the employment relationship. Similarly, the manual worker claim is based on Defendant's failure to pay Plaintiff on a weekly basis throughout her employment as required by NYLL § 191(1)(a)(i).

Any attempt to dispute these points, would at minimum, create genuine disputes of material facts which would warrant a denial of Defendant's pre-answer motion to dismiss based on the fact-intensive res judicata affirmative defense. This is especially true where, unlike *Chapman*, there is no record here of the proceedings in the first action that can tell use with reasonable reliability what claim were asserted in the first action.

The fundamental flaw in the district court's logic is that it assumes all harms during an employment relationship, are a single harm based on the same or related

facts even if they clearly are not and even where the employment relationship spanned several years. See also, *Medcalf v. Thompson Hine LLP*, 84 F. Supp. 3d 313, 319–20 (S.D.N.Y. 2015)(finding that res judicata did not bar second action asserting statutory claims based on the employment relationship even though first action also asserted claims based on the employment relationship and where the claims in both actions matured before the first action was filed in the same court.).

3. THE RES JUDICATA DEFENSE IS IN CONFLICT WITH THE FLSA AND NYLL AND THEREFORE INAPPLICABLE IN THIS ACTION

Res judicata is not a valid defense to the FLSA and NYLL claims in this case. In this regard, the Second Circuit in *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959), stated in relevant part as follows:

> Appellant's argument of estoppel ignores that this case lies in an area where agreements and other acts that would normally have controlling legal significance are overcome by Congressional policy. An agreement by appellee not to claim overtime pay for the work here in question would be no defense to his later demanding it. Overnight Motor Transp. Co. v. Missel, 1942, 316 U.S. 572, 577, 62 S.Ct. 1216, 86 L.Ed. 1682. Similarly, an express release by the employee is invalid, and this even though the release is limited to the claims for liquidated damages and was made in settlement of a bona fide dispute, D. A. Schulte, inc. v. Gangi, 1946, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114. Surely acts by an employee leading the employer to believe he is satisfied with the payments being made to him, even if we could find these here, could not have greater effect than a contract to that end.

Borrowing from the Second Circuit in *Caserta*, if a contract waiving FLSA claims has no validity under the FLSA, "surely" the fact that an employee brought

her federal claims in federal court instead of a prior small claims court action, cannot possibly result in waiver and loss of her FLSA and NYLL statutory overtime claims. This is an issue that requires careful attention especially after the Second Circuit's relatively recent decision in *Cheeks v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015). See also, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 (1946).

As the New York Court of Appeals stated in *Landau v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 14, 892 N.E.2d 380, 384 (2008), 'We remain mindful that if applied too rigidly, res judicata has the potential to work considerable injustice. *"In properly seeking to deny a litigant 'two days in court', courts must be careful not to deprive [her] of one."'* The district court in this case was not mindful of the advice of the New York Court of Appeals in Landau, and in so doing, improperly denied Plaintiff her day in Court for the claims asserted in this action.

VI. CONCLUSION

WHEREFORE, Plaintiff respectfully requests this Honorable Court reverse the order and judgment of the district court in their entirety, reinstate the complaint and remand for further proceedings and litigation of all claims, and grant Plaintiff such other, further and different relief in Plaintiff's favor as the Court deems just and proper.

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Respectfully submitted,

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 7,994 words of text.

The brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman, Size 14.

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