St. John's Law Review

Volume 56, Summer 1982, Number 4 Article 9

Dismissal of Action on Statute of Frauds and Statute of Limitations Grounds Is Sufficiently Close to Merits to Bar Subsequent Suit Under Doctrine of Res Judicata

Thomas J. Quigley

the *Kleefeld* decision imposes a burden upon the proponent of a will that most often will prove fatal to the establishment of the proponent's case.

Louis J. Ragusa

DEVELOPMENTS IN NEW YORK LAW

Dismissal of action on Statute of Frauds and statute of limitations grounds is sufficiently close to merits to bar subsequent suit under doctrine of res judicata

The doctrine of res judicata prevents the relitigation of matters already judicially decided.[89] In practice, it operates to preclude

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(6th ed. 1980); *see In re* Will of Robinson, 257 App. Div. 405, 407, 13 N.Y.S.2d 324, 326-27 (4th Dep't 1939); *In re* Will of Leaven, 47 N.Y.S.2d 668, 669 (Sur. Ct. Westchester County 1944); *In re* Will of Field, 109 Misc. 409, 410-11, 178 N.Y.S. 778, 778-79 (Sur. Ct. Westchester County 1919). One commentator has criticized vehemently the practice of executing copies of the original will, positing:

> [T]here should be but one original (executed) will which will be the ribbon copy of a typed will. That is the *only* instrument to be signed by the testator and the witnesses. Carbon or Xerox copies are not to be signed because executing them would mean multiple original wills, all of which would have to be produced and proved for probate.

J. COX, J. ARENSON & S. MEDINA, *supra* note 63, ¶ 1407.01, at 14-103 (emphasis in original).

[89] The doctrine of res judicata is deeply embedded in our system of jurisprudence and is deemed to be an essential tenet of the legal systems of all civilized nations. 2 A. FREEMAN, THE LAW OF JUDGMENTS § 626 (5th ed. 1925); *see* Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952). *See generally* Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 1 (1952). The doctrine is based upon the broad public policy that there should be an end to the litigation of a matter once it has been decided. Kromberg v. Kromberg, 56 App. Div. 2d 910, 912, 392 N.Y.S.2d 907, 909 (2d Dep't 1977), *aff'd*, 44 N.Y.2d 718, 376 N.E.2d 923, 405 N.Y.S.2d 451 (1978); Eissing Chem. Co. v. People's Nat'l Bank, 205 App. Div. 89, 91, 199 N.Y.S. 342, 344 (2d Dep't), *aff'd*, 237 N.Y. 532, 143 N.E. 731 (1923); 5 WK&M ¶ 5011.07, at 50-72; von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 299 (1929); *cf.* Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158, 1159 (1961) (concerning collateral estoppel, "the dignity of the processes of law is attacked each time a party relitigates a matter that has once been decided"). Indeed, it has been noted that the interests of society are best served when a degree of finality is attached to an adjudicated dispute. A. FREEMAN, *supra*, § 626; *see* Weiner v. Greyhound Bus Co., 55 App. Div. 2d 189, 191, 389 N.Y.S.2d 884, 886 (2d Dep't 1976). *See also* 9 CARMODY-WAIT 2d § 63:197 (1966). Moreover, limiting litigation promotes peace and order in the community by creating "certainty in the relations of men." von Moschzisker, *supra*, at 303; *see* New York State Labor Relations Bd. v. Holland Laundry, Inc., 294 N.Y. 480, 493, 63 N.E.2d 68, 74 (1945).

Additionally, considerations of judicial economy dictate that repetitious litigation be avoided, Reilly v. Reid, 45 N.Y.2d 24, 28, 379 N.E.2d 172, 175, 407 N.Y.S.2d 645, 648 (1978), for it would be an impermissible burden on tribunals already facing crowded court calendars to allow a party "two days in court" in order to litigate a dispute twice, *see* von Moschzisker, *supra*, at 300; Note, *Collateral Estoppel in New York*, *supra*, at 1158-59. Res judicata

a party from instituting an action which would raise matters that properly could have been litigated in a prior suit as well as those which already have been adjudicated.[90] This rule traditionally has been limited to situations in which the prior case had been decided on its merits.[91] Recently, however, in *Smith v. Russell Sage Col-*

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prevents such a waste of judicial machinery. *See* Note, *Developments in the Law—Res Judicata, supra,* at 820. The doctrine also is designed to promote the public policy of curbing the "litigiousness of the obstinate litigant." *See In re* Haus, 33 App. Div. 2d 1, 7, 304 N.Y.S.2d 930, 934 (4th Dep't 1969); Eissing Chem. Co. v. People's Nat'l Bank, 205 App. Div. 89, 91, 199 N.Y.S. 342, 344 (2d Dep't), *aff'd,* 237 N.Y. 532, 143 N.E. 73 (1923). Indeed, the party who prevails in a lawsuit should be entitled to the reasonable assurance that he will not be vexed by the threat of further litigation. *See* Reilly v. Reid, 45 N.Y.2d 24, 28, 379 N.E.2d 172, 175, 407 N.Y.S.2d 645, 648 (1978). The rising costs of litigation make this consideration increasingly important. *See* Note, *Collateral Estoppel in New York, supra,* at 1158-59.

The policies supporting res judicata have been said to justify the doctrine's effect of preventing relitigation of a controversy which is later discovered to have been erroneously decided "whether due to oversight by the parties or error by the courts." Reilly v. Reid, 45 N.Y.2d 24, 28, 379 N.E.2d 172, 175, 407 N.Y.S.2d 645, 648 (1978). One commentator has noted "that society's interests are better served by foreclosing repetitious litigation than by permitting litigants to show that the truth is otherwise than as found or assumed in a prior action." Rosenberg, *Collateral Estoppel in New York,* 44 ST. JOHN'S L. REV. 165, 166 (1969).

[90] *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 69, 246 N.E.2d 725, 727-28, 298 N.Y.S.2d 955, 958 (1969); Liberty Mut. Ins. Co. v. Colon & Co., 260 N.Y. 305, 312, 183 N.E. 506, 508 (1932). In determining whether the doctrine of res judicata bars an action, New York courts inquire whether the party instituting the action had a full and fair opportunity to be heard in a previous suit. Schwartz v. Public Adm'r, 24 N.Y.2d at 71, 246 N.E.2d at 728, 298 N.Y.S.2d at 959; New York Labor Relations Bd. v. Holland Laundry, Inc., 294 N.Y. 480, 493, 63 N.E.2d 68, 74 (1945); Kromberg v. Kromberg, 56 App. Div. 2d 910, 912, 392 N.Y.S.2d 907, 909 (2d Dep't 1977), *aff'd,* 44 N.Y.2d 718, 376 N.E.2d 923, 405 N.Y.S.2d 451 (1978); SIEGEL § 442. The "full and fair opportunity" test, however, does not condition the applicability of res judicata upon a determination that the litigant actually used the opportunity to raise the issues in the prior action. *See* Schwartz v. Public Adm'r, 24 N.Y.2d at 70, 246 N.E.2d at 727, 298 N.Y.S.2d at 958. Indeed, in Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937), the Court of Appeals stated that when "a full opportunity has been afforded to a party to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues." *Id.* at 18, 9 N.E.2d at 759. The courts have emphasized, however, that the public policy underlying res judicata should not be applied so zealously as to deprive a litigant of his actual opportunity to be heard. Reilly v. Reid, 45 N.Y.2d 24, 28, 379 N.E.2d 172, 175, 407 N.Y.S.2d 645, 648 (1978).

[91] Rudd v. Cornell, 171 N.Y. 114, 127, 63 N.E. 823, 827 (1902); SIEGEL § 446; 5 WK&M ¶ 5011.11, at 50-80; *see, e.g.,* Clark v. Scovill, 198 N.Y. 279, 283, 91 N.E. 800, 801 (1910). The requirement that a judgment be rendered on the merits does not necessarily mean that the first action must have culminated in a full trial. Palmer v. Fox, 28 App. Div. 2d 968, 968, 283 N.Y.S.2d 216, 218 (4th Dep't 1967), *aff'd,* 22 N.Y.2d 662, 238 N.E.2d 751, 291 N.Y.S.2d 361 (1968); 5 WK&M ¶ 5013.04, at 50-193; *see* Bankers Trust v. Jackson, 99 Misc. 2d 225, 227, 415 N.Y.S.2d 731, 732 (N.Y.C. Civ. Ct. N.Y. County 1979). Indeed, it has been noted that the term "on the merits" is not to be taken literally in the moral or abstract sense of the words. *See* A. FREEMAN, *supra* note 89, § 723, at 1531; *cf.* SIEGEL § 446 (merits requirement

lege,[92] the Court of Appeals held that dismissal of an action on the grounds of the Statute of Frauds and statute of limitations was "sufficiently close to the merits" to preclude, in a subsequent lawsuit, consideration of the substance of a different claim which arose out of the same set of facts.[93]

In *Russell Sage*, the plaintiff brought an action alleging that the defendant college had breached an oral employment agreement and that its president had engaged in tortious conduct designed to ensure that the plaintiff would be removed from his teaching position.[94] Special term granted the defendant's motion to dismiss,[95]

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only means that the disposition in the first action is not to be given any greater effect in the second action than originally intended when made). It merely requires that the parties in the first action "might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence, and the court had properly understood the facts and correctly applied the law." A. FREEMAN, *supra* note 89, § 723, at 1531.

Traditionally, when a judgment was based upon an objection which prevented a court from reaching the substance of a claim, only relitigation of claims which suffered from the same defect would be barred. *E.g.*, Converse v. Sickles, 146 N.Y. 200, 207, 40 N.E. 777, 779 (1895). In Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953), the Court of Appeals held that a contract action dismissed on the ground of the Statute of Frauds did not bar a subsequent suit in quantum meruit for the reasonable value of services rendered. *Id.* at 70, 111 N.E.2d at 213. The Court noted that because the Statute of Frauds defense prevented a final adjudication on the merits, the decision was conclusive only as to the precise issue decided. *Id.* at 72, 111 N.E. at 214; *see* Potter v. Emerol Mfg. Co., 275 App. Div. 265, 268-69, 89 N.Y.S.2d 68, 71 (1st Dep't 1949). Similarly, a judgment dismissing a claim on the ground that the statute of limitations had run was given res judicata effect only as to the precise issue that the claim was time-barred. SIEGEL § 276; *see* Spindell v. Brooklyn Jewish Hosp., 35 App. Div. 2d 962, 963, 317 N.Y.S.2d 963, 965 (2d Dep't 1970), *aff'd*, 29 N.Y. 888, 278 N.E.2d 912, 328 N.Y.S.2d 678 (1972); *cf.* Fitzgerald v. Title Guar. & Trust Co., 290 N.Y. 376, 381, 49 N.E.2d 489, 492-93 (1943) (dismissal of a contract action did not bar an action for fraud).

An accelerated judgment is designed to dispose of an action without having to try the merits of the case. *See* SIEGEL § 256. Such judgments are not considered to be dispositions on the merits for res judicata purposes. *See, e.g.*, Rosensteil v. Rosensteil, 43 Misc. 2d 462, 466, 251 N.Y.S.2d 565, 569 (Sup. Ct. N.Y. County), *vacated on other grounds*, 21 App. Div. 2d 635, 253 N.Y.S.2d 206 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966). Hence, dismissals based upon lack of jurisdiction or forum non conveniens ordinarily do not raise the res judicata bar. *E.g.*, Brown v. Bullock, 17 App. Div. 2d 424, 428, 235 N.Y.S.2d 837, 841 (1st Dep't 1962). Similarly, dismissals for failure to prosecute are not held to be dispositions on the merits. Mintzer v. Carl M. Loeb, Rhodes Co., 10 App. Div. 2d 27, 37, 197 N.Y.S.2d 54, 59 (1st Dep't 1960).

[92] 54 N.Y.2d 185, 429 N.E.2d 746, 445 N.Y.S.2d 68 (1981).

[93] *Id.* at 194, 429 N.E.2d at 750, 445 N.Y.S.2d at 72.

[94] *Id.* at 189, 429 N.E.2d at 747, 445 N.Y.S.2d at 69. Six years after the plaintiff was appointed by Russell Sage College as assistant dean, the position was abolished and he was fired. *Id.* at 188-89, 429 N.E.2d at 747, 445 N.Y.S.2d at 69. The plaintiff sued, alleging that when he initially was hired, the president of the college orally promised him that if the deanship did not work out, he would be given a teaching position. *Id.* at 188, 429 N.E.2d at 747, 445 N.Y.S.2d at 69. The plaintiff claimed that the individual who succeeded the presi-

determining that the contract was unenforceable under the Statute of Frauds[96] and that the claim sounding in tort was barred by the statute of limitations.[97] Foregoing an appeal, the plaintiff instituted a subsequent action against the college for fraud, based upon the same set of facts.[98] Raising the defense of res judicata as well as the previously asserted substantive defenses,[99] the defendant again moved to dismiss.[100] Special term denied the motion, rejecting all of the defendant's contentions.[101] A unanimous appellate division agreed that the doctrine of res judicata was inapplicable, but dismissed the complaint on substantive grounds.[102]

On appeal, the Court of Appeals affirmed the dismissal of the complaint, but found that this disposition was mandated by the doctrine of res judicata.[103] Writing for a unanimous court, Judge Fuchsberg noted that in applying the res judicata bar, the relevant inquiry is whether the subsequent claim has arisen out of the same "transaction" or "series of transactions" as the previously adjudicated cause of action, regardless of differences in the theories of

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dent refused to honor the contract and maliciously sought to have him fired, after making statements upon which the plaintiff relied to his detriment. *Id.* at 188-89, 429 N.E.2d at 747, 445 N.Y.S.2d at 69.

[95] *Id.* at 190, 429 N.E.2d at 748, 445 N.Y.S.2d at 70.

[96] *Id.*; *see* GOL § 5-701(a)(1) (1978) (contracts not to be performed within 1 year or before the end of a lifetime must be in writing). *See generally* 2 A. CORBIN, CONTRACTS §§ 447, 450 (1950).

[97] 54 N.Y.2d at 190, 429 N.E.2d at 748, 445 N.Y.S.2d at 70. The plaintiff's tort claims were barred by the 1-year statute of limitations. *Id.*; *see* CPLR 215(3) (1972).

[98] 54 N.Y.2d at 190, 429 N.E.2d at 748, 445 N.Y.S.2d at 70. The complaint in the second action alleged that statements made by the individual who served as president of the college at the time of the dismissal, led the plaintiff to believe that his position with the college was secure, thus encouraging him to forego other employment. *Id.* at 190-91, 429 N.E.2d at 748, 445 N.Y.S.2d at 70. Although the statements allegedly were made well before the first action was instituted, the plaintiff contended that he did not discover their fraudulent nature until sometime during the first lawsuit. *Id.*

[99] *Id.* at 191, 429 N.E.2d at 748, 445 N.Y.S.2d at 70.

[100] *Id.*

[101] *Id.* In denying the defendant's motion, special term reasoned that the two successive suits were "essentially different," and that the fraud action was a recent discovery, so that the splitting doctrine, *see* SIEGEL § 220, was inapplicable. 54 N.Y.2d at 191, 429 N.E.2d at 748, 445 N.Y.S.2d at 70.

[102] Smith v. Russell Sage College, 78 App. Div. 2d 913, 913, 432 N.Y.S.2d 914, 916 (3d Dep't 1980), *aff'd*, 54 N.Y.2d 185, 429 N.E.2d 746, 445 N.Y.S.2d 68 (1981). The appellate division dismissed the action because the plaintiff's own testimony indicated that deception, a necessary element of the cause of action for fraud, was lacking. 78 App. Div. 2d at 913, 432 N.Y.S.2d at 916.

[103] 54 N.Y.2d at 192, 429 N.E.2d at 749, 445 N.Y.S.2d at 71.

recovery advanced or forms of relief sought.[104] The Court observed that the plaintiff's new claim for fraud was based upon the same agreement, involved the same parties, covered the same time period, and was motivated by the same concerns as the original suit.[105] Since the two actions arose out of the same transaction, the Court reasoned that the second claim was barred on res judicata grounds.[106] Moreover, noting that dismissal of the original suit had been predicated upon the Statute of Frauds and the statute of limitations, the Court posited that these bases for dismissal were "sufficiently close to the merits" to bar a subsequent action.[107] The Court supported this proposition by noting that the Statute of Frauds often has been considered a rule of substantive contract law, and that the statute of limitations also has been characterized as having substantive impact since it frequently is "the difference between life or death" of a claim.[108]

The *Russell Sage* Court appears to have extended the scope of the res judicata doctrine by holding that a judgment can bar a subsequent suit arising out of the same transaction, notwithstanding the absence of a strict determination on the merits.[109] It is submit-

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[104] *Id.* at 194, 429 N.E.2d at 750, 445 N.Y.S.2d at 72 (citing Reilly v. Reid, 45 N.Y.2d 24, 29, 379 N.E.2d 172, 175-76, 407 N.Y.S.2d 645, 648 (1978)).

[105] 54 N.Y.2d at 193, 429 N.E.2d at 749, 445 N.Y.S.2d at 71.

[106] *Id.* at 193, 429 N.E.2d at 749-50, 445 N.Y.S.2d at 71.

[107] *Id.* at 194, 429 N.E.2d at 750, 445 N.Y.S.2d at 72.

[108] *Id.* Addressing the question whether the plaintiff's prior action had resulted in a disposition on the merits, the Court, quoting Professor Corbin, stated that "since 'legal rights and duties are incapable of definition without reference to societal remedies,' the effect of the Statute of Frauds . . . brings it to the level of a rule of substantive law." *Id.* (quoting 2 A. CORBIN, *supra* note 96, § 279). Similarly, the Court noted that the statute of limitations also possesses substantive impact in many cases. 54 N.Y.2d at 194, 429 N.E.2d at 750, 445 N.Y.S.2d at 72. Moreover, the Court found it significant that the tentative drafts of the Restatement, Second, of Judgments have eliminated the term "on the merits" from its rules of merger and bar. *Id.* at 194 n.3, 429 N.E.2d at 750 n.3, 445 N.Y.S.2d at 71 n.3; *see* RESTATEMENT (SECOND) OF JUDGMENTS §§ 47-48 (Tent. Draft No. 1, 1973).

[109] Notably, the *Russell Sage* Court emphasized that the first dismissal was effectuated through a summary judgment motion, permitting the trial judge to consider evidence presented by the parties together with their pleadings. *See* 54 N.Y.2d at 194, 429 N.E.2d at 750, 445 N.Y.S.2d at 72. One commentator has noted that the practice of treating a defendant's CPLR 3211(a) motion to dismiss on Statute of Frauds and statute of limitations grounds as a motion for summary judgment is comparable to a disposition on the merits. *See* CPLR 3211, commentary at 74 (McKinney 1970). Professor Siegel has stated:

> The judge's election to "treat" the 3211 motion as one for summary judgment is his shorthand term to indicate that he has a complete body of evidence before him on the motion, that he has examined it carefully, that he finds the claim or defense to lack merit, and that he therefore wants the judgment to be on the whole merits rather than limited to the particular 3211 ground on which the motion was

ted that the Court's flexible view of the "on the merits" requirement is a natural corollary of New York's adoption of the transactional approach to evaluate the applicability of res judicata.[110] Transactional analysis is designed to further the pragmatic policies underlying the res judicata doctrine[111] by requiring a party to liti-

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made.

Id.

[110] *See generally* Reilly v. Reid, 45 N.Y.2d 24, 379 N.E.2d 172, 407 N.Y.S.2d 645 (1979). The transactional approach seems to have had its source in the statement by Judge Cardozo that res judicata bars not only those matters which actually were litigated in an action, but also those claims which might have been raised, if the claims are so related that the rights established in the first action would be impaired by a different result in the second. Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929) (Cardozo, C.J.); *accord*, Pagano v. Arnstein, 292 N.Y. 326, 328, 55 N.E.2d 181, 183 (1944). In Reilly v. Reid, 45 N.Y.2d 24, 379 N.E.2d 172, 407 N.Y.S.2d 645 (1979), the Court of Appeals firmly adopted the transactional analysis which, subsequent to Judge Cardozo's statement, was espoused in the Restatement, Second, of Judgments. *Id.* at 30, 379 N.E.2d at 176, 407 N.Y.S.2d at 648. As noted by the *Russell Sage* Court, the Restatement's approach focuses on the "claim" which gave rise to the initial litigation and defines it as embracing all the remedial rights derived from a relevant transaction or series of transactions. *See* 54 N.Y.2d at 192, 429 N.E.2d at 729, 445 N.Y.S.2d at 71; RESTATEMENT (SECOND) OF JUDGMENTS § 61 comment a (Tent. Draft No. 5, 1978). Significantly, the authors of the Restatement deliberately chose not to employ the term "on the merits" because of its potentially misleading connotations. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 48 comment a (Tent. Draft No. 1, 1973). In determining whether a set of facts constitutes a transaction, the Restatement advises the courts to consider "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." RESTATEMENT (SECOND) OF JUDGMENTS § 61(2) (Tent. Draft No. 5, 1978); *cf.* Clark v. Taylor, 163 F.2d 940, 942 (2d Cir. 1947) (a transaction is the subject matter of a claim, not the legal rights derived therefrom, which is not affected by modifications or subtractions from the central core of facts). For a discussion of what constitutes a claim, see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.10, at 52-57 (2d ed. 1977); Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U. L. REV. 357, 359-65 (1967).

Under the transactional view, all claims arising out of the same factual situation should be litigated together even if the theories of recovery asserted or the forms of relief sought differ in some respects. RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 (Tent. Draft No. 1, 1973); *see, e.g.*, Gowan v. Tully, 45 N.Y.2d 32, 36, 379 N.E.2d 177, 179, 407 N.Y.S.2d 650, 652 (1978); Reilly v. Reid, 45 N.Y.2d 24, 30, 379 N.E.2d 172, 175, 407 N.Y.S.2d 645, 648 (1978); Eidelberg v. Zelermayer, 5 App. Div. 2d 658, 663, 174 N.Y.S.2d 300, 304 (1st Dep't 1958), *aff'd*, 6 N.Y.2d 815, 159 N.E.2d 691, 188 N.Y.S.2d 204 (1959). In O'Brien v. City of Syracuse, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981), the Court of Appeals noted that

> [w]hen alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single "factual grouping" . . . the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions.

Id. at 357-58, 429 N.E.2d at 1160, 445 N.Y.S.2d at 687 (footnote and citation omitted).

[111] *See* note 89 *supra*.

gate the entire controversy when he is given his "day in court."[112] Indeed, it has long been recognized that a party should be discouraged from injecting matters into an action which should have been raised in prior litigation.[113] The purposes of the transactional approach, therefore, appear to justify the *Russell Sage* Court's decision to focus upon the plaintiff's opportunity to present all of his claims in the original action, while deemphasizing the particular ground upon which the action had been dismissed. It seems that when a litigant has rejected the opportunity to assert all available claims, the distinction as to whether a judgment is "on the merits" or "close to the merits," should be immaterial.[114]

In light of the Court of Appeals' decision in *Russell Sage,* it is suggested that the practitioner would be well advised to include all theories and claims arising out of the same transaction when draft-

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[112] Becker v. State, 79 App. Div. 2d 599, 601, 433 N.Y.S.2d 502, 504 (3d Dep't 1980); *see* Hyman v. Hillelson, 79 App. Div. 2d 725, 726, 434 N.Y.S.2d 742, 745 (3d Dep't 1980), *aff'd,* 55 N.Y.2d 624, 430 N.E.2d 1304, 446 N.Y.S.2d 251 (1981) (the application of transactional analysis "is in accord with the policy basis of the doctrine that res judicata is designed to provide finality in the resolution of disputes to assure that parties may not be vexed by further litigation"); Burgher v. Purcell, 109 Misc. 2d 531, 540, 440 N.Y.S.2d 480, 487 (Sup. Ct. Nassau County 1981); R.G. Barry Corp. v. Mushroom Makers, Inc., 108 Misc. 2d 113, 116, 436 N.Y.S.2d 927, 930 (Sup. Ct. N.Y. County 1981).

The authors of the Restatement specifically addressed the situation in which a plaintiff seeks to recover on an unenforceable contract. The value of services rendered may be recovered in restitution, but the plaintiff is expected to litigate the entire transaction in one lawsuit and is not permitted to advance the different theories of recovery in separate actions. RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 comment h, illustrations 12-14 (Tent. Draft No. 5, 1978). This is now the law in New York. As noted, *see* note 91 *supra,* in Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953), the Court of Appeals allowed a plaintiff to recover in quantum meruit what he could not recover in an earlier contract action, because the two actions involved materially different elements of proof. *Id.* at 72, 111 N.E.2d at 214. This reasoning is inconsistent with the purpose of the transactional approach and, indeed, the Court recently has declared that "[t]o the extent Smith v. Kirkpatrick . . . may be to the contrary, it is overruled." O'Brien v. City of Syracuse, 54 N.Y.2d 353, 358 n.1, 429 N.E.2d 1158, 1160 n.1, 445 N.Y.S.2d 687, 689 n.1 (1981). Notably, the Restatement espouses a similar position regarding a plaintiff's attempt to recover alternative remedies in tort. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 comment g, illustrations 13-14 (Tent. Draft No. 5, 1978). While the New York courts have not yet had occasion to pass on this issue, it appears that the reasoning of *O'Brien* would be equally applicable.

[113] *See* Secor v. Sturgis, 16 N.Y. 548, 554 (1858). In *Secor,* the Court of Appeals declared that "an entire claim arising . . . from a wrong, cannot be divided and made the subject of several suits." *Id.* This rule has evolved into an aspect of res judicata known as splitting a cause of action. 5 WK&M ¶ 5011.15, at 50-100. Although it is generally confined to situations in which a plaintiff attempts to recover parts of a single monetary debt in several actions, SIEGEL § 220, the rule is designed to encourage a plaintiff to litigate a single claim on one occasion and is thus applicable to the rationale underlying the doctrine of res judicata in general. *See* note 89 *supra.*

[114] *See* SIEGEL § 447.

ing a complaint for an aggrieved client. Moreover, the decision necessitates that the practitioner should make full use of New York's liberal pleading system, which allows a plaintiff to pursue alternative and inconsistent theories of recovery[115] and freely permits him to amend his complaint during the course of litigation.[116]

Thomas J. Quigley

Municipal incorporation criteria set by townships are not preempted by Village Law

Comprehensive growth plans document the development strategies of municipalities.[117] Often motivated by drastic population shifts and correlative problems in pollution, housing, and public

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[115] *See* CPLR 3014, 3017 (1974). CPLR 3014 permits claims to be pleaded inconsistently, alternatively or even hypothetically. *Id.* This liberality in pleading is premised upon a legislative recognition that litigation is often unpredictable, and that parties therefore should be permitted to set forth all arguments which offer a reasonable possibility of success. CPLR 3014, commentary at 8 (1974); *see, e.g.*, Abbot v. Page Airways, Inc., 23 N.Y.2d 502, 514, 245 N.E.2d 388, 395, 297 N.Y.S.2d 713, 722 (1969). *See also* SIEGEL § 214; 3 WK&M ¶ 3014.11-12. Additionally, CPLR 3017 allows the pleader to demand alternative and inconsistent forms of relief. *See* CPLR 3017 (1974).

[116] CPLR 3025(b) provides that "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." CPLR 3025(b) (1974).

[117] General comprehensive plans represent: (1) a source of information as to economic activity, population composition, channels of movement and physical resources; (2) a program of correction, indicating an area's functional deficiencies; (3) an estimate of the future, guiding the municipality in promoting general welfare; (4) a clarification of goals and the type of city the community wants; (5) a technique for coordination; and (6) a device to stimulate public interest and responsibility. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353, 356-61 (1955). The enhancement of regional welfare may be accomplished through the use of regional planning mechanisms, such as master plans, that lodge most decisionmaking power at the local level, subject to standards reflecting area-wide interests. Bagne, *The Parochial Attitudes of Metropolitan Governments: An Argument for a Regional Approach to Urban Planning and Development*, 22 ST. LOUIS U.L.J. 271, 287 (1978). Master plans have almost been likened to small-scale constitutions since they require future implementary legislation to be in conformity with the plan's goals. *See* Haar, *supra*, at 357. Professor Haar has objected to the use of the term "master plan" because it connotes a rigid design or blueprint rather than a flexible working guide. *Id.* at 354 n.4. The term also may create an exclusive concern with purely physical arrangements and facilities, thus indirectly leading planners to minimize the plan's social and economic goals. *Id.* The terms "developmental plan," "long range comprehensive plan," or "general community plan" are preferred by the planning community. *Id.*