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HENRY PASCARELLA ET AL. *v.* ROBERT SILVER ET AL.
(AC 44514)

Elgo, Moll and Suarez, Js.

Syllabus

The plaintiffs, P and R Co., appealed to this court from the judgment of the trial court determining, inter alia, that they could not prevail on their claim in their declaratory judgment action that the defendant S Co. was barred on the basis of res judicata from bringing any claims against them under a certain participation agreement entered into by the parties and that res judicata did not bar the claims asserted in S Co.'s counterclaim. Pursuant to the participation agreement, in exchange for a monetary investment, S Co. received the right to participate in any increase in the future economic value of certain commercial real estate. In 2006, S Co. commenced an action against the plaintiffs for their failure to comply with the terms of the agreement. The trial court ruled in favor of S Co. on its breach of contract claim, determining that the plaintiffs had failed to make certain payments to S Co. as part of their cash flow distributions. The trial court also found that the agreement had not been terminated or cancelled, and it awarded damages to S Co. The trial court's judgment was affirmed by this court. In 2011 and 2012, S Co. commenced additional actions against the plaintiffs, alleging breaches of the agreement, which it later withdrew. In 2016, the plaintiffs commenced the present action against S Co. and its president, S, seeking a declaratory judgment that, on the basis of res judicata, the defendants had no continuing rights under the agreement and were prohibited from bringing any additional claims thereunder. The plaintiffs withdrew their claims against S shortly thereafter. S Co. then filed a counterclaim seeking, inter alia, a declaratory judgment that the 2006 action adjudicated S Co.'s rights to damages under the agreement only through 2008 and that, under the doctrine of res judicata, S Co. had a continuing right to cash distributions under the agreement. In response, the plaintiffs filed special defenses alleging, inter alia, that res judicata barred all counts of the counterclaim in light of the 2006 action. The trial court granted the plaintiffs' motion to bifurcate the trial, held a trial solely on the issue of res judicata, and determined that res judicata did not apply to the facts of the case. On the plaintiffs' appeal, *held*:

1. The plaintiffs' invocation of res judicata as the basis of their declaratory action was untenable: pursuant to *Tracey* v. *Miami Beach Assn.* (216 Conn. App. 379), the offensive use of res judicata is generally unavailable, but a party that has obtained a valid and final judgment in its favor could maintain an enforcement action to secure vindication of such judgment, and, in the present case, the plaintiffs' claim that their action could be characterized as an enforcement action was unavailing because, in the 2006 action, they were the defendants, they did not prevail on the breach of contract claim, and they had monetary damages assessed against them, and, on appeal, they provided no legal authority to support their claim.
2. The plaintiffs' first special defense, in which they alleged that the doctrine of res judicata barred S Co. from asserting its counterclaim, was unavailing: the application of res judicata was inappropriate because the underlying claim in the 2006 action, which concerned the alleged breach of the agreement regarding S Co.'s entitlement to distributions for the period between 1997 and 2008, was not the same as that at issue in S Co.'s counterclaim, which was predicated on S Co.'s alleged entitlement to distributions made subsequent to the resolution of the 2006 action, such claim did not exist at the time of the 2006 action, as the trial court in that action specifically found that S Co.'s interest in the agreement was a contingent, speculative investment, that further breaches of the agreement remained hypothetical unless certain contingencies transpired, and that proof of such breaches would require additional evidence beyond that submitted in the 2006 action, and S Co.'s interest in the vindication of a just claim outweighed the public policy goals of

promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties; moreover, the application of res judicata was inappropriate because, in the 2006 action, S Co. did not have the opportunity to fully litigate its claimed entitlement to distributions under the agreement beyond those at issue in the 2006 action, as it did not yet exist at the time of that action; furthermore, contrary to the plaintiffs' assertion, in the 2006 action, S Co. had the option to bring a claim for damages for the total breach of the agreement but was not required to do so because, although the agreement was a contract that created continuing obligations on behalf of the plaintiffs with respect to cash distributions and a written statement that P had made in 1999 could have been considered a repudiation of the plaintiffs' obligations under the agreement, such repudiation was not accompanied by a material breach of the agreement, and, as the proper application of res judicata to the facts was flexible, rather than mechanical, in nature, the rules in the Restatement (Second) of Judgments governing claim splitting (§§ 24 and 26) were required to be read together and should not have barred S Co. from maintaining its counterclaim.

Argued October 25, 2022—officially released March 28, 2023

Procedural History

Action seeking, inter alia, a judgment declaring that the defendants are prohibited from bringing any claims against the plaintiffs pursuant to a certain participation agreement entered into by the parties, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the plaintiffs withdrew their claims against the named defendant; thereafter, the court, *Genuario*, *J.*, granted the plaintiffs' motion to bifurcate the trial; subsequently, the issue of the applicability of the doctrine of res judicata was tried to the court, *Genuario*, *J.*; judgment for the defendant R.S. Silver Enterprises, Inc., from which the plaintiffs appealed to this court. *Affirmed.*

Wesley W. Horton, with whom were *Karen L. Dowd*, and, on the brief, *Scott T. Garosshen*, *Brendan J. O'Rourke*, and *Peter J. Zarella*, for the appellants (plaintiffs).

James M. Nugent, for the appellee (defendant R.S. Silver Enterprises, Inc.).

Opinion

ELGO, J. This case concerns the proper application of the doctrine of res judicata. In their one count complaint, the plaintiffs, Henry Pascarella and Riversedge Partners,[1] predicated their declaratory judgment action against the defendant R.S. Silver Enterprises, Inc.,[2] entirely on that doctrine of preclusion. Following a bifurcated bench trial, the trial court concluded that res judicata did not apply under the facts of this case. The plaintiffs now challenge the propriety of that determination. We affirm the judgment of the trial court.

The facts underlying this litigation are not in dispute. At all relevant times, Pascarella was a real estate developer and practicing attorney, who previously had worked with Robert Silver, a licensed real estate broker, on several real estate projects. In 1997, Pascarella informed Silver of an investment opportunity regarding commercial real estate located at 200 Pemberwick Road in Greenwich (property). Pascarella subsequently drafted a "participation agreement" (agreement) that the parties entered into in 1997. In exchange for an investment of $1,250,000, the defendant was "given the contractual right to participate 'in any increase in the economic value' and 'future economic enhancement' of the [property]. More specifically, the agreement entitled the [defendant] to split equally all amounts received by the [plaintiffs] in connection with the [property] after the making of certain priority payments." *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 148 Conn. App. 359, 362, 86 A.3d 471, cert. dismissed, 311 Conn. 938, 89 A.3d 351 (2014).

In 2006, the defendant commenced an action against the plaintiffs stemming from their failure to comply with the terms of the agreement (2006 action). Its operative complaint contained four counts that alleged breach of contract, breach of fiduciary duty, and breach of a "letter agreement" between the parties and sought an accounting.[3]

Following an eleven day court trial, the court ruled in favor of the defendant on the breach of contract count.[4] In its memorandum of decision, the court found that the agreement had not "been terminated or cancelled and all the rights and obligations thereof are in full force and effect."[5] Significantly, the court specifically found that the defendant's interest in the agreement "was not a partnership interest or an equity interest," but rather was "a contingent speculative investment." As the court explained, for the defendant "to receive its cash flow distributions: (1) [Riversedge Partners] must have positive cash flow after paying all debt service and other expenses; (2) [any] preference payments [made by Pascarella] would have to be paid in full; and (3) Pascarella as managing partner of [Riversedge Partners] would have to decide . . . to make

a . . . cash distribution."[6] The court further found that the plaintiffs had breached the agreement by failing to make any payments to the defendant as part of their "cash flow distributions net of the full amount of the Pascarella preference payments." The court thus awarded the defendant $2,602,323 in damages, which included an award of prejudgment interest pursuant to General Statutes § 37-3a. The propriety of that judgment was affirmed by this court. See *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 163 Conn. App. 1, 35, 134 A.3d 662, cert. denied, 320 Conn. 929, 133 A.3d 460 (2016).

In fashioning relief in favor of the defendant in the 2006 action, the court rejected the defendant's request for the appointment of a receiver over the affairs of Riversedge Partners, stating: "There is no claim in this case for damages consisting of [the defendant's] half of [the cash] distributions after the year 2008. . . . [T]he court takes judicial notice of a new related civil action returnable to this court on January 11, 2012, (Docket No. CV-11-5013782-S) commenced by [the defendant] against [the plaintiffs] for breach of the same [agreement], claiming damages which include the alleged failure of the [plaintiffs] 'to pay to [the defendant] one half of the cash distributions resulting from the operations of [Riversedge Partners].' To the extent that the [defendant] is claiming damages incurred in 2009 and thereafter they would be part of the damages claimed in that new action, which has a claim for the appointment of a receiver during the pendency of the action." That new action referred to by the court was brought by the defendant in 2011 (2011 action). Its complaint contained one count alleging breach of the agreement by the plaintiffs without reference to any dates or time periods. The defendant subsequently withdrew that action.

In August, 2012, the defendant commenced another action that alleged breach of the agreement by the plaintiffs regarding cash distributions "from January 1, 2009, to the present" and breach of fiduciary duty by Pascarella (2012 action).[7] In response, the plaintiffs moved for summary judgment on res judicata and prior pending action grounds related to the 2006 action. The defendant did not file a responsive pleading to that motion and withdrew the 2012 action in 2013.

In August, 2016, the plaintiffs commenced the present action against the defendant. Their complaint consisted of one count, in which they sought a declaratory judgment pursuant to General Statutes § 52-29. The plaintiffs alleged in relevant part that, in light of the 2011 and 2012 actions, they had "a bona fide concern that [the defendant] will attempt to commence yet another lawsuit against the plaintiffs in an effort to claim that [the defendant is] entitled to recover any distributions under the [agreement], despite the res judicata effect of the judgment in the 2006 action and the subsequent filings

and withdrawal of two further actions—the 2011 and 2012 actions—by [the defendant]." The plaintiffs also alleged that Silver had "recently made statements in the real estate marketplace that he continues to hold an interest" in the property, which created a cloud on its title and negatively impacted their ability to manage and refinance the property.[8] The plaintiffs thus asked the court to render a declaratory judgment "that (i) [the defendant] liquidated its claims in the 2006 action, (ii) based on the doctrine of res judicata, [the defendant] has no continuing or ongoing rights under the [agreement], and (iii) the [defendant is] prohibited from bringing any claims or actions under, or relating to, the [agreement] against the plaintiffs or the [property]."

The defendant filed an answer and three special defenses to that complaint.[9] The defendant also filed a four count counterclaim against the plaintiffs. In count one, it sought a declaratory judgment that "(i) the 2006 action adjudicated the [defendant's] rights to damages under the [agreement] only through December 31, 2008; (ii) based on the doctrine of res judicata, and/or collateral estoppel, the [defendant] has the continuing and ongoing right under the [agreement] to receive 50 percent of all cash distributions; and (iii) the [plaintiffs] are to provide annual operating reports of Riversedge Partners." In count two, the defendant sought a constructive trust, and count three alleged a breach of the covenant of good faith and fair dealing with respect to the plaintiffs' alleged failure to carry out their obligations under the agreement. In count four, the defendant sought an accounting of "any cash distributions" that the plaintiffs received after December 31, 2008. The plaintiffs, in turn, filed an answer and six special defenses to that counterclaim. Notably, the plaintiffs alleged therein that res judicata barred all counts of the defendant's counterclaim in light of the judgment rendered in the 2006 action.

The plaintiffs filed motions for summary judgment on November 15, 2016, and May 5, 2018, on the ground that any claims by the defendant regarding its rights under the agreement were barred by the doctrine of res judicata. The court denied those motions. On July 15, 2019, the defendant filed a certificate of closed pleadings, in which it requested a court trial.

On November 15, 2019, the plaintiffs filed a motion to bifurcate the trial pursuant to General Statutes § 52-205,[10] claiming that the resolution of their res judicata claims likely would "obviate the need for trial on the remaining claims and counterclaims" of the parties. The court granted that motion and scheduled a trial "of the issue of res judicata raised by the pleadings . . . ." That trial was held on September 30, 2020, at which numerous exhibits were admitted into evidence and the court heard testimony from Silver and Aldo Pascarella, the son of Pascarella.[11] In its subsequent memorandum

of decision, the court concluded that the doctrine of res judicata did not apply under the facts of this case, and this appeal followed.

As a preliminary matter, we note the well established legal standard that governs our review in this appeal. The proper application of the doctrine of res judicata presents a question of law, over which our review is plenary. See *Testa* v. *Geressy*, 286 Conn. 291, 306, 943 A.2d 1075 (2008).

I

THE PLAINTIFFS' DECLARATORY ACTION

We first consider the proper application of res judicata with respect to the declaratory action brought by the plaintiffs in 2016. To do so, we must address a critical distinction regarding the plaintiffs' invocation of that doctrine.

As this court recently explained in *Tracey* v. *Miami Beach Assn.*, 216 Conn. App. 379, 288 A.3d 629 (2022), "[u]nder Connecticut law, the doctrine of res judicata is pleaded as a special defense. . . . Its primary posture is defensive in nature, in that it bars relitigation of a claim on which a valid and final personal judgment has been rendered in favor of a party. . . . [W]e are aware of no Connecticut appellate authority in which res judicata has been endorsed for offensive use with respect to claim preclusion, and for good reason: Offensive claim preclusion is nonexistent. A plaintiff cannot reassert a claim that he has already won." (Citations omitted; internal quotation marks omitted.) Id., 392. In *Tracey*, this court clarified that the plaintiffs, in bringing their declaratory action, "did not attempt to wield the doctrine of res judicata offensively but, rather, sought something fundamentally distinct: vindication of the claim asserted in the [prior] action and embodied in the [prior] judgment. . . . [T]he present action is one to enforce a prior judgment of the Superior Court. An action to enforce a prior judgment is the consequence of the doctrine of merger . . . by which a plaintiff's claim is extinguished and rights upon the judgment are substituted for it following the rendering of a valid and final judgment. . . . Accordingly, when a party thereafter seeks to enforce those rights by maintaining an action upon the judgment . . . it is not seeking to relitigate a matter [that] it already has had an opportunity to litigate. . . . Rather, it is attempting to enforce a valid judgment . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 393–94.

Tracey was decided subsequent to the filing of appellate briefs in this appeal. For that reason, following oral argument in this appeal, this court ordered the parties to file supplemental briefs "addressing the viability of the offensive use of res judicata under Connecticut law, which formed the basis of the plaintiffs' declaratory judgment complaint, and whether the plaintiffs' claim

fails as a matter of law if the offensive use of res judicata is rejected."

In their supplemental brief, the plaintiffs do not quarrel with the reasoning set forth in *Tracey*. To the contrary, they submit that they "are seeking the same vindication" as did the plaintiffs in that case. They state: "Just like in *Tracey*, the plaintiffs are not seeking to use res judicata to recover new relief on some new claim. Rather, they are using res judicata to vindicate the finality of a prior judgment . . . . [The plaintiffs submit] that, to the extent an 'offensive' use is understood as a new claim for new relief, an offensive use of claim preclusion cannot exist . . . . To the extent an 'offensive' use is understood as simply using a procedure such as declaratory or injunctive relief to enforce a prior judgment, such a use is viable." (Citations omitted.) The plaintiffs thus recognize that the offensive use of res judicata generally is unavailable to a plaintiff and maintain that, in bringing the present declaratory action, they sought to enforce the prior judgment rendered in the 2006 action.

In *Tracey*, this court held that a party that has obtained a valid and final judgment in its favor may thereafter maintain an enforcement action to secure vindication of that judgment on its original claim. See *Tracey* v. *Miami Beach Assn.*, supra, 216 Conn. App. 393–96; accord 1 Restatement (Second), Judgments § 18, pp. 151–52 (1982).[12] In the 2006 action at issue here, the court rendered judgment in favor of the defendant—who was the plaintiff in that action—on the breach of contract count and entered an award of monetary damages in its favor regarding "cash distributions for the period 1997 through 2008 . . . ." It is undisputed that the plaintiffs satisfied that monetary judgment in October, 2016.

Had they not done so, the defendant, as a plaintiff and prevailing party in the prior action, plainly would be entitled to bring a subsequent action to enforce the judgment in the 2006 action. That is not the case here. Rather, this anomalous case involves parties seeking to maintain an action to enforce a prior judgment who (1) were *defendants* in the prior action, (2) did not prevail on the breach of contract claim at issue, and (3) had monetary damages assessed against them with respect to that claim.[13] They have provided no legal authority indicating that it is permissible for such a party to do so. The plaintiffs were neither the plaintiffs in the 2006 action nor the prevailing party on the cause of action they now purportedly seek to vindicate. See *Tracey* v. *Miami Beach Assn.*, supra, 216 Conn. App. 393 (emphasizing that "the plaintiffs did not attempt to wield the doctrine of res judicata offensively but, rather, sought something fundamentally distinct: vindication of the claim asserted in the [prior] action and embodied in the [prior] judgment"). Although our precedent and

the Restatement (Second) of Judgments recognize the right of a plaintiff to bring an action to enforce a judgment on which it has prevailed; see *Garguilo* v. *Moore*, 156 Conn. 359, 361–64, 242 A.2d 716 (1968); *Denison* v. *Williams*, 4 Conn. 402, 404–405 (1822); 1 Restatement (Second), supra, § 18, pp. 151–52; we are aware of no authority that suggests that an action commenced by a defendant, *against* whom judgment has been rendered, properly can be characterized as an action to enforce. Accordingly, the plaintiffs' invocation of res judicata as the basis for their declaratory action is untenable.

II

THE PLAINTIFFS' SPECIAL DEFENSE

We turn next to the plaintiffs' invocation of res judicata as a special defense to the counterclaim filed by the defendant. That procedural posture necessitates a different analysis of the plaintiffs' claim regarding the proper application of that doctrine of preclusion.

Following the commencement of this declaratory action by the plaintiffs, the defendant filed a four count counterclaim against the plaintiffs in which it sought, inter alia, a declaratory judgment that "(i) the 2006 action adjudicated the [defendant's] rights to damages under the [agreement] only through December 31, 2008; (ii) based on the doctrine of res judicata, and/or collateral estoppel, the [defendant] has the continuing and ongoing right under the [agreement] to receive 50 percent of all cash distributions; and (iii) the [plaintiffs] are to provide annual operating reports of Riversedge Partners."[14] In response, the plaintiffs filed an answer and six special defenses to that counterclaim. Relevant to this appeal is their first special defense, in which they alleged that res judicata barred all counts of the counterclaim in light of the 2006 action.

The court held a bifurcated trial on the res judicata issue and thereafter issued a memorandum of decision in which it concluded that the doctrine of res judicata did not preclude the defendant's counterclaim.[15] On our plenary review of that question of law; see *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 347, 63 A.3d 940 (2013); we agree.

"The doctrine of res judicata provides that [a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties . . . upon the same claim or demand. . . . Res judicata prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [C]laim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or might have been made. . . . [T]he essential concept of the modern rule of claim preclusion is that a judgment against [the] plaintiff is preclusive not simply when it is on the merits but when the procedure in the first action afforded [the]

plaintiff a fair opportunity to get to the merits. . . . [W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Weiss* v. *Weiss*, 297 Conn. 446, 459–60, 998 A.2d 766 (2010).

Res judicata is a "judicially created [rule] of reason that [is] enforced on public policy grounds . . . ." (Citation omitted; internal quotation marks omitted.) Id., 460. "Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate. . . . Thus, res judicata prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Citation omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 157–58, 129 A.3d 677 (2016).

Because the doctrine of res judicata "can yield harsh results," our Supreme Court has emphasized that it "should be flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) Id., 158. "[A] decision whether to apply the doctrine of res judicata . . . should be made based upon a consideration of the doctrine's underlying policies . . . ." (Citation omitted.) *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 591, 674 A.2d 1290 (1996). "[T]he purposes of res judicata [are] promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties." *Weiss* v. *Weiss*, supra, 297 Conn. 465; see also *United States* v. *Liquidators of European Federal Credit Bank*, 630 F.3d 1139, 1152 (9th Cir. 2011) (describing "the goals of res judicata" as "fairness, finality, and avoidance of duplicate judicial proceedings"). Those policies, however, must be "balanced against the competing interest of the plaintiff in the vindication of a just claim." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 350, 15 A.3d 601 (2011). Moreover, in all cases in which res judicata is invoked, "the scope of matters precluded necessarily depends on what has occurred in the former adjudication." *State* v. *Ellis*, 197 Conn. 436, 467, 497 A.2d 974 (1985).

With that context in mind, we note that, "[g]enerally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same

underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 156–57. In the present case, the first two elements are not in dispute.[16] We therefore focus our attention on the third and fourth elements of that doctrine.

A

For res judicata to apply, the same underlying claim must be at issue. Id., 157. Our Supreme Court has adopted a transactional test "as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata. [T]he claim [that is] extinguished [by the judgment in the first action] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as 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." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 604, 922 A.2d 1073 (2007); see also 1 Restatement (Second), supra, § 24, comment (b), pp. 198–99 (transactional test "is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases").

The purpose of the transactional test is "to measure the preclusive effect of a prior judgment"; *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 365, 511 A.2d 333 (1986); so as to "strike a delicate balance between . . . the interests of the defendant and of the courts in bringing litigation to a close and . . . the interest of the plaintiff in the vindication of a just claim." (Internal quotation marks omitted.) *Cadle Co.* v. *Gabel*, 69 Conn. App. 279, 298, 794 A.2d 1029 (2002). It operates as a screening mechanism to prevent a party from obtaining "a second bite at the apple . . . [when] the present claims are ones arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not in the [prior action]." (Internal quotation marks omitted.) *Larry* v. *Powerski*, 148 F. Supp. 3d 584, 597 (E.D. Mich. 2015).

It is a fundamental precept of res judicata jurisprudence that "the doctrine . . . does not preclude parties from bringing claims that did not exist at the time of the prior proceeding." *Consolidation Coal Co.* v. *Maynes*, 739 F.3d 323, 327 (6th Cir. 2014); see also *Johnson* v. *Flemming*, 264 F.2d 322, 324 (10th Cir. 1959) ("[t]he doctrine of res judicata generally extends only to facts and conditions as they existed at the time the judgment was rendered and does not apply where there

are new facts which did not exist at the time of the prior judgment"). As the United States Supreme Court noted in the seminal case of *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122 (1955), "a prior judgment is res judicata only as to suits involving the same cause of action." In ascertaining whether a subsequent action involved the same underlying claim as that advanced in the prior action, the court explained: "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. . . . [A] course of conduct . . . may frequently give rise to more than a single cause of action. . . . The conduct presently complained of was all subsequent to the [prior] judgment. . . . While the [prior] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." (Footnotes omitted.) Id., 327–28.

Guided by that precedent, the United States Court of Appeals for the Second Circuit has stated: "With respect to the determination of whether a second suit is barred by res judicata, the fact that both suits involved essentially the same course of wrongful conduct is not decisive . . . nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues . . . . A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is whe[re] the same evidence is needed to support both claims, and whe[re] the facts essential to the second were present in the first. . . . If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion." (Citations omitted; internal quotation marks omitted.) *Securities & Exchange Commission* v. *First Jersey Securities, Inc.*, 101 F.3d 1450, 1463–64 (2d Cir. 1996), cert. denied, 522 U.S. 812, 118 S. Ct. 57, 139 L. Ed. 2d 21 (1997).

The United States Court of Appeals for the Sixth Circuit similarly has held that "[a] successful plaintiff should not be forever barred from asserting new claims based on continuous wrongful conduct, even if that conduct is identical to the subject of a prior suit. . . . If [parties] were forever barred from asserting claims based on conduct that occurs after a prior suit is decided, defendants [to the prior action] could continue a course of unlawful conduct undeterred." (Footnote omitted.) *Nguyen* v. *Cleveland*, 534 Fed. Appx. 445, 452–53 (6th Cir. 2013). As the court observed: "If a plaintiff sues a defendant more than once based on an ongoing course of conduct, the doctrine of claim preclusion will typically not prevent the plaintiff from asserting a cause of action that arose after the first suit was decided. . . . When allegedly unlawful conduct occurs after a case has been decided, and that conduct

gives rise to a new cause of action . . . a new suit based on that cause of action is not barred by the first suit." (Citations omitted.) Id., 452.

This court has adhered to that bedrock principle. In *Cadle Co.* v. *Gabel*, supra, 69 Conn. App. 297–98, we expressly relied on *Lawlor*, as well as the Restatement (Second) of Judgments,[17] for the proposition that res judicata does not apply when "part of the conduct complained of [in the second action] occurred *after* the judgment alleged by the defendants to have preclusive effect." (Emphasis in original.) Because the plaintiff's claim in the subsequent action in that case concerned operative facts that occurred after judgment was rendered in the prior action, this court held that res judicata did not bar the plaintiff's claim. Id., 298–99.

That precept applies equally in the breach of contract context. As the Second Circuit has observed, "[t]he fact that both suits involved essentially the same course of wrongful conduct is not decisive. . . . Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first. . . . While a previous judgment may preclude litigation of claims that arose prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. . . . Thus, when the parties have entered into a contract to be performed over a period of time and one party has sued for a breach, res judicata will preclude the party's subsequent suit for any claim of breach that had occurred prior to the first suit; it will not, however, bar a subsequent suit for any breach that had not occurred when the first suit was brought." (Citations omitted; internal quotation marks omitted.) *Prime Management Co.* v. *Steinegger*, 904 F.2d 811, 815–16 (2d Cir. 1990).

The defendant's counterclaim in the present case, like the first count of its complaint in the 2006 action, concerns an alleged breach of contract regarding cash distributions due under the agreement. Whereas the 2006 action concerned the defendant's entitlement to distributions "for the period 1997 through 2008," the counterclaim is predicated on the defendant's alleged entitlement to distributions made by Pascarella *subsequent* to the resolution of that prior action. In this regard, it bears emphasis that the court, in rendering judgment in the 2006 action, specifically found that the defendant's interest in the agreement was "a contingent speculative investment" and that the defendant was not entitled to any cash distributions unless a series of contingencies first transpired.[18] "Under Connecticut law, damages may not be predicated on a contingency." *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App.

177, 193, 90 A.3d 219 (2014). Unless and until the contingencies outlined by the trial court in its decision in the 2006 action transpired; see footnote 18 of this opinion; any further breaches of the agreement by the plaintiffs remained hypothetical. Moreover, proof of such subsequent breaches by the plaintiffs would necessitate additional evidence beyond that submitted in the 2006 action of essential facts that were not present in the prior action. See *Securities & Exchange Commission* v. *First Jersey Securities, Inc.*, supra, 101 F.3d 1463–64; *Prime Management Co.* v. *Steinegger*, supra, 904 F.2d 816. As a result, the claim advanced in the defendant's counterclaim did not yet exist at the time of the 2006 action. See *Nguyen* v. *Cleveland*, supra, 534 Fed. Appx. 452. To paraphrase the United States Supreme Court, while the judgment in the 2006 action precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims that did not exist at the time of that prior action. See *Lawlor* v. *National Screen Service Corp.*, supra, 349 U.S. 328.

Indeed, this court reached that very conclusion in *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 137 Conn. App. 359, 368–69, 48 A.3d 705, cert. denied, 307 Conn. 916, 54 A.3d 180 (2012) (*Landmark*), precedent on which the trial court here relied in its memorandum of decision. Like the present case, *Landmark* involved a breach of contract dispute; like the present case, the defendant in *Landmark* argued that "the claim brought by the plaintiff in the [subsequent] action is a part of the transaction or series of transactions out of which the first action arose . . . [which allegedly] forms a convenient trial unit" and that "the same [agreement] is in dispute, and the plaintiff is seeking the same claim for damages." Id., 362–63. The defendant thus claimed that res judicata barred the second action. Id., 362. On appeal, this court disagreed, stating: "Although we agree with the defendant that the cases overlap to the extent specified, they remain sufficiently distinct to elude the application of the doctrine of res judicata. The injury that provides the foundation for the plaintiff's cause of action in this matter . . . occurred wholly subsequent to the judgment in the previous matter. . . . [T]he conduct complained of occurred *after* the judgment alleged by the defendants to have preclusive effect. . . . [T]o conclude that [the plaintiff's] claim is now barred by res judicata would be to require omniscience in litigation. . . . Requiring no such omniscience, we conclude that the doctrine of res judicata does not apply under these circumstances." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 368–69. That logic applies equally here.

In addition, we note that the doctrine of res judicata is equitable in nature. See, e.g., *Jones* v. *Alton*, 757 F.2d 878, 885 (7th Cir. 1985) (res judicata "is an equitable doctrine, and subject to equitable principles"); *U.S.*

Bank, *National Assn.* v. *Madison*, 341 Conn. 809, 814, 268 A.3d 64 (2022) (describing res judicata as equitable doctrine); *Sams* v. *Dept. of Environmental Protection*, 308 Conn. 359, 401 n.30, 63 A.3d 953 (2013) ("res judicata is based on equitable principles"). In rendering judgment in favor of the defendant in the 2006 action, the trial court declined its request for the appointment of a receiver due in part to the pendency of the 2011 action, which involved the same parties and the same breach of contract claim regarding cash distributions under the agreement. In its memorandum of decision, the court took judicial notice of that related action and stated: "To the extent that the [defendant] is claiming damages incurred in 2009 and thereafter, they would be part of the damages claimed in that new action, which has a claim for the appointment of a receiver during the pendency of the action." When considered in tandem with the court's determination that the defendant's interest in the agreement was "a contingent speculative investment" that precluded a claim to particular cash distributions unless a series of contingencies first transpired, we believe that the public policy goals of "promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties"; *Weiss* v. *Weiss*, supra, 297 Conn. 465; in this case are outweighed by the defendant's "interest in the vindication of a just claim." (Internal quotation marks omitted.) *Lighthouse Landings*, *Inc.* v. *Connecticut Light & Power Co.*, supra, 300 Conn. 350. Although the defendant may not prevail on his claim of entitlement to additional distributions under the agreement, we conclude that it is not foreclosed from asserting such a claim under the doctrine of res judicata.

B

For res judicata to apply, there also "must have been an adequate opportunity to litigate the matter fully . . . ." *Wheeler* v. *Beachcroft*, *LLC*, supra, 320 Conn. 156–57. We already have concluded in part II A of this opinion that the defendant's claimed entitlement to additional distributions under the agreement beyond those at issue in the 2006 action did not yet exist at the time of that action. In light of that conclusion, there necessarily was not an adequate opportunity to fully litigate such a claim in the 2006 action. As a result, res judicata is inappropriate on that basis as well. See *Cayer Enterprises*, *Inc.* v. *DiMasi*, 84 Conn. App. 190, 194, 852 A.2d 758 (2004).

C

As a final matter, we address the plaintiffs' ancillary contention regarding the purported repudiation of their obligations under the agreement in 1999. Relying on the Restatement (Second) of Judgments, the plaintiffs assert that, because their repudiation was accompanied by a material breach of the agreement, the defendant

in the 2006 action was obligated to bring a claim for damages for the total breach of the agreement. Its failure to do so, the plaintiffs argue, bars the defendant's counterclaim under the doctrine of res judicata. We do not agree.

The following additional facts are undisputed and relevant to that contention. In April, 1997, Silver issued a promissory note to Riversedge Partners that was guaranteed by the defendant.[19] That contract obligated Silver to repay Riversedge Partners the sum of $200,000 plus interest within one year.

The parties thereafter entered into the agreement at issue in this appeal, which contains the following reference to that promissory note: "In the event [that the defendant] fails to pay any sums due [under this agreement], or due to [Riversedge Partners under the] Promissory Note, a copy of which is attached hereto as Exhibit 'B,' in a timely manner, Pascarella may, at Pascarella's option, elect to equitably reduce or charge the [defendant's interest under the agreement] to compensate Pascarella and the other partners of [Riversedge Partners] for such non-payment." The present case thus involves two distinct contracts—a promissory note that obligated Silver to make repayment to Riversedge Partners and a "participation agreement" that authorized Pascarella to "equitably reduce or charge" the defendant's entitlement to cash distributions under the agreement should repayment of that promissory note not occur.[20]

It is undisputed that neither Silver nor the defendant repaid the promissory note, as the trial court found in the 2006 action. In its memorandum of decision, the court in the 2006 action also found that, "[o]n August 26, 1999, when the promissory note was in default, Pascarella and Silver met . . . to discuss the defaulted note" and that "Pascarella made unsigned handwritten notes of the meeting . . . ."[21] In those notes, Pascarella stated that if Silver did not make repayment within a specified time frame, he would be "out of [the] Riversedge project completely with no remaining interest or carry at all."[22] (Internal quotation marks omitted.)

In light of that unequivocal statement in Pascarella's handwritten notes of the August 26, 1999 meeting, the plaintiffs maintain that they repudiated their obligations under the agreement when Silver failed to repay the promissory note in December, 1999. For that reason, they claim that the defendant was required to bring a claim for the total breach of the agreement in the 2006 action. Because it did not do so, the plaintiffs contend that the defendant's counterclaim is barred by the doctrine of res judicata. They rely on the Restatement (Second) of Judgments, which provides in relevant part: "A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract

that consist of failure to render performance due after commencement of the first action. . . . But if the initial breach is accompanied or followed by a 'repudiation' . . . and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid 'splitting,' to claim all his damages with respect to the contract, prospective as well as past, and judgment in the action precludes any further action by the plaintiff for damages arising from the contract."[23] (Citations omitted.) 1 Restatement (Second), supra, § 26, comment (g), p. 240.

At the same time, the plaintiffs acknowledge in their appellate reply brief that, when a party's repudiation is not accompanied by a material breach of a contract that imposes continuing obligations, the injured party has the option, but is not required, to treat it as a total breach. See *Minidoka Irrigation District* v. *Dept. of Interior*, 154 F.3d 924, 926 (9th Cir. 1998) ("[a] contract that creates continuing obligations is capable of a series of partial breaches or a single total breach by repudiation" (internal quotation marks omitted)); *Barlow & Haun, Inc.* v. *United States*, 118 Fed. Cl. 597, 616 (2014) ("where a party has repudiated a contract, a claim for breach of contract ripens when performance becomes due or when the other party to the contract opts to treat the repudiation as a present total breach"), aff'd, 805 F.3d 1049 (Fed. Cir. 2015); *Martin* v. *Kavanewsky*, 157 Conn. 514, 518–19, 255 A.2d 619 (1969) (following defendants' statement that they would not perform their contractual obligations, plaintiff "was entitled to treat [it] as a repudiation of the contract" and maintain claim for total breach); *Wilson* v. *Western Alliance Corp.*, 78 Or. App. 197, 202 n.4, 715 P.2d 1344 ("when a plaintiff has already fully performed his part when the repudiation occurs, courts *may* permit a series of actions against the repudiator for nonperformance, especially when payments are based on a contingency" (emphasis in original)), review denied, 301 Or. 446, 723 P.2d 325 (1986); 15 R. Lord, Williston on Contracts (4th Ed. 2014) § 45:19, p. 402 n.10 (noting injured party's options when continuing contract repudiated); 10 J. Murray, Corbin on Contracts (Rev. Ed. 2014) § 53:14, p. 92 (explaining that contracts requiring continuing performance to pay money over period of time are "capable of a series of 'partial' breaches, as well as of a single total breach by repudiation").

It is undisputed that the agreement here was a contract that created continuing obligations on the part of the plaintiffs with respect to cash distributions. Although the statement in Pascarella's handwritten notes that Silver would be " 'out of [the] Riversedge project completely with no remaining interest or carry at all' " if he did not repay the promissory note could constitute a repudiation of the plaintiffs' obligations under the agreement,[24] that repudiation was not accompanied by a material breach of the agreement. It is true, as the plaintiffs contend, that the court in the 2006

action found that the plaintiffs breached the agreement by failing to pay the defendant cash distributions as required thereunder. The court, however, also found that the defendant was not entitled to any cash distribution payments until the latter half of 2003, years *after* the plaintiffs claim to have repudiated their obligations under the agreement.[25] Accordingly, the plaintiffs' breach of the agreement did not accompany their 1999 repudiation of their obligations under the agreement. For that reason, the defendant had the option, but was not required, to treat that repudiation as a total breach of the agreement in the 2006 action.[26] See 1 Restatement (Second), supra, § 26, comment (g), pp. 240–41.

Because an injured party in such circumstances has the option to treat a repudiation as a total breach, the plaintiffs contend that res judicata bars the defendant's counterclaim, as that doctrine applies to claims that "were actually made or *might have been made*." (Emphasis added; internal quotation marks omitted.) *Joe's Pizza, Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 872, 675 A.2d 441 (1996). The plaintiffs overlook the fact that the proper application of res judicata to a particular set of facts is flexible, rather than mechanical, in nature. See *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 158.

In this regard, we note that the various provisions of the Restatement (Second) of Judgments are intended to complement each other and thus must be read together. See, e.g., *Guerrero* v. *Dept. of Corrections & Rehabilitation*, 28 Cal. App. 5th 1091, 1108 n.16, 239 Cal. Rptr. 3d 726 (2018) (reading together §§ 24 and 26 of Restatement (Second) of Judgments); *Day* v. *Davidson*, 951 P.2d 378, 383 (Wyo. 1997) (reading together "the pertinent provisions" of Restatement (Second) of Judgments); *Martinez* v. *Colombian Emeralds, Inc.*, 51 V.I. 174, 223 (2009) (Swan, J., dissenting) ("[N]o section of the Restatement can be read in isolation. . . . They should be read together." (Footnote omitted.)). While § 26 of the Restatement (Second) of Judgments recognizes certain "[e]xceptions" to the general rule concerning "splitting" of a plaintiff's claim; 1 Restatement (Second), supra, § 26, p. 233; we believe it properly must be read in conjunction with § 24, which expressly sets forth the "general rule concerning 'splitting.' " Id., § 24, p. 196.

Section 24 articulates what commonly is known as the transactional test; see part II A of this opinion; by which "the preclusive effect of a prior judgment" is measured; *Duhaime* v. *American Reserve Life Ins. Co.*, supra, 200 Conn. 365; and provides in relevant part that "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." 1 Restatement (Second), supra, § 24 (1), p. 196. At the same time, § 24 distinguishes the scenario in which

facts material to a particular claim arise *subsequent* to the rendering of a final judgment. See id., § 24, comment (f), p. 203. In that scenario, the Restatement recognizes that a second action on a similar claim may be permitted.[27] See id. ("[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first"). A court's ability to permit such an action is consistent with the precepts that the transactional test is "a pragmatic standard"; id., comment (b), pp. 198–99; and, more generally, that res judicata is a flexible doctrine. See *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265, 269 (2d Cir. 1977); *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 66, 171 A.3d 409 (2017). As we explained in part II A of this opinion, the defendant's counterclaim is predicated on alleged breaches of the agreement by the plaintiffs that occurred subsequent to the judgment in the 2006 action and thus requires proof of material operative facts that were not present in the prior action. Read together, we conclude that, on the particular facts of this case, the rules governing claim splitting memorialized in §§ 24 and 26 of the Restatement and our decisional law should not operate to bar the defendant from maintaining that counterclaim despite the plaintiffs' purported repudiation of their obligations under the agreement.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] While this appeal was pending, Pascarella died, and this court subsequently granted the motion to substitute the coexecutors of his estate, Aldo Pascarella and Cassandra Pascarella Berger, as plaintiffs in his stead.

We also note that the plaintiff Riversedge Partners is a Connecticut general partnership that formerly was known as SPD Associates. In its memorandum of decision, the trial court noted that, "[b]ecause [SPD Associates] is the same entity with a different name, all references to the entity will be [to] its current name Riversedge Partners." For purposes of clarity, we employ the same nomenclature. We therefore refer to Henry Pascarella and Riversedge Partners collectively as the plaintiffs and individually by name in this opinion.

[2] At all relevant times, Robert Silver was the president and owner of R.S. Silver Enterprises, Inc. Although the plaintiffs also named Silver as a defendant, they withdrew the complaint against him shortly after this action was commenced. We therefore refer to R.S. Silver Enterprises, Inc., as the defendant.

[3] In its original complaint, the defendant alleged in relevant part that it had acquired "a partnership interest" in Riversedge Partners by entering into the agreement. By contrast, in its operative complaint dated January 26, 2009, the defendant alleged that it had acquired "an equity interest" in Riversedge Partners by entering into the agreement. As the trial court emphasized in its memorandum of decision, "[t]he January 26, 2009 amended complaint became the operative complaint for the trial without objection" from the plaintiffs. Moreover, we note that the defendant did not allege an anticipatory breach of contract claim against the plaintiffs. Contra *Land Group, Inc.* v. *Palmieri*, 123 Conn. App. 84, 87, 1 A.3d 234 (2010) ("[t]he plaintiff instituted a three count complaint against the defendants . . . alleging anticipatory breach of the contract, breach of contract and breach of the implied covenant of good faith and fair dealing").

[4] At trial, the court dismissed the breach of a letter agreement count. It thereafter found in favor of the plaintiffs on the breach of fiduciary duty and accounting counts. Those counts are not germane to this appeal.

[5] At oral argument before this court, the plaintiffs' counsel was asked if there was "anything in the court's decision [in the 2006 action] that indicates that the [agreement] is no longer in full force and effect" following the rendering of that judgment. Counsel answered that query in the negative.

[6] In reaching that determination, the court specifically found that "[§] 4 of the [agreement] gives Pascarella or his designees exclusive control and management of [Riversedge Partners] including the power to decide when and if any cash distributions shall be made. Section 10 [of the agreement] describes that power of control as 'the essence of the [a]greement' and prohibits 'any interference or participation by [the defendant] . . . .' "

[7] As the trial court in the present case noted: "The 2012 action asserted that [the defendant] was seeking to recover distributions under the [agreement] that had accrued to its benefit after December 31, 2008, which is the last year for which [the defendant] had introduced evidence of damages in the 2006 action."

[8] We reiterate that the plaintiffs withdrew their complaint against Silver soon after this action was commenced. See footnote 2 of this opinion.

[9] In its special defenses, the defendant alleged that the plaintiffs' declaratory action was barred by waiver, estoppel, and the doctrines of "res judicata and/or collateral estoppel."

[10] General Statutes § 52-205 provides: "In all cases, whether entered upon the docket as jury cases or court cases, the court may order that one or more of the issues joined be tried before the others."

[11] Pursuant to Practice Book § 63-8 (e) (1), appellants are required to file with the appellate clerk an "unmarked" copy of any transcripts necessary to the appeal. The plaintiffs failed to comply with that requirement. Instead, they submitted a photocopy of the September 30, 2020 transcript that contains handwritten comments, question marks, and underlined or circled statements throughout. We do not condone that practice and remind counsel of their obligation to comply with the rules of appellate procedure when filing transcripts with this court.

[12] Section 18 of the Restatement (Second) of Judgments provides: "When a valid and final personal judgment is rendered in favor of the plaintiff:

"(1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and

"(2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action." 1 Restatement (Second), supra, § 18, pp. 151–52.

[13] The breach of contract count was the only count on which the defendant prevailed in the 2006 action, and the court's judgment in that regard was predicated on the defendant's entitlement to distribution payments under the agreement—the same issue that underlies the plaintiffs' declaratory action in the present case.

[14] The defendant also alleged a breach of the covenant of good faith and fair dealing and sought both a constructive trust and an accounting of "any cash distributions" that the plaintiffs received after December 31, 2008.

[15] In so doing, the court expressly deferred consideration of the plaintiffs' collateral estoppel defense.

[16] In their principal appellate brief, the plaintiffs submit that "[t]he four elements of res judicata are met." The defendant, by contrast, maintains that the third and fourth elements are not satisfied in the present case.

[17] See 1 Restatement (Second), supra, § 24, comment (f), p. 203 ("[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first").

[18] In rendering judgment in favor of the defendant in the 2006 action, the court specifically found that, "in order for [the defendant] to receive its cash flow distributions, (1) [Riversedge Partners] must have positive cash flow after paying all debt service and other expenses; (2) [any] preference payments [made by Pascarella] would have to be paid in full; and (3) [Pascarella] as managing partner of [Riversedge Partners] would have to decide . . . to make a . . . cash distribution." The court also found that the agreement gave "Pascarella or his designees exclusive control and management of [Riversedge Partners] including the power to decide when and if any cash distributions shall be made" and prohibited "any interference or participation by [the defendant] . . . ." (Internal quotation marks omitted.)

[19] "A promissory note is simply a written contract for the payment of money." (Internal quotation marks omitted.) *Ankerman* v. *Mancuso*, 271

Conn. 772, 777, 860 A.2d 244 (2004).

[20] The court in the 2006 action found that the agreement "provides the [plaintiffs] with two specific remedies for nonpayment of the [promissory] note," pursuant to which (1) they could reduce any distributions to the defendant by the unpaid amount or (2) "when the cash flow situation does not permit a distribution or the [defendant's] share of the distribution is less than the unpaid Silver obligation," they could " 'charge' or lien or impose a trust on future distributions to recoup the nonpayment."

[21] In its memorandum of decision in the 2006 action, the court found that "Silver did not agree with the terms of the Pascarella notes" and that "[h]e was not asked to sign and did not sign" them.

[22] In the 2006 action, the plaintiffs claimed that the agreement had been terminated when the deadline specified in Pascarella's handwritten notes passed without repayment of the promissory note. The trial court rejected that claim, stating in relevant part: "The [plaintiffs] claim that the [agreement] was terminated or extinguished by [Pascarella] . . . on December 31, 1999. The court finds by a preponderance of the evidence that there was no termination on that date or in that time frame. Absolutely nothing of note happened at that time. December 31, 1999, only figures in the evidence because it was the 'deadline' given by Pascarella to Silver for a partial payment on the [promissory note] . . . . Exhibit V, which is Pascarella's unsigned [handwritten notes] says 'If *any* payment is not made on time [Silver] is out of [the Riversedge] project completely with no remaining interest or carry at all.' The most that this statement can be considered to be is a warning that Pascarella intended on August 26, 1999, to exercise [Riversedge Partners'] default remedies under the note guarantee and/or the [agreement] if no payment was made on the note by December 31, 1999. No such payment was made, but the note had been in default since October 28, 1997, and matured without payment on April 28, 1998, without consequence. . . . There is no evidence whatsoever that Pascarella . . . took any steps to make such an 'election' or 'exercise' [his] 'option' to invoke one or more of those remedies, or 'extinguish' the investment in satisfaction of a $200,000 promissory note. At the very least the situation called for some form of book entry and written or at least verbal notice to [Silver] as maker of the note, and [the defendant] as guarantor of the note and holder of the [agreement] . . . . Absolutely no such entry was made and no form of notice was given. . . . The record is void of any evidence of any *action* taken by [Pascarella] . . . to terminate or extinguish the [agreement] or cancel the [promissory note] . . . and the court accepts [Silver's] testimony that no notice was given." (Emphasis in original; footnote omitted.) Although the plaintiffs subsequently appealed from the judgment rendered in the 2006 action, they did not challenge the propriety of the court's determinations in this regard. See *R.S. Silver Enterprises, Inc.* v. *Pascarella*, supra, 163 Conn. App. 4–5; *R.S. Silver Enterprises, Inc.* v. *Pascarella*, supra, 148 Conn. App. 361–62.

[23] After quoting 1 Restatement (Second), supra, § 26, comment (g), the plaintiffs state in their appellate reply brief: "In short, if repudiation accompanies material breach, it moves from '*may*' to '*must*' claim total breach." (Emphasis in original.)

[24] "A repudiation is a manifestation by one party to the other that the first cannot or will not perform at least some of its obligation under the contract." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 161, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015). In their principal appellate brief, the plaintiffs submit that they "breached [the agreement] by failing to pay distributions, and repudiated by saying the deal was over."

[25] In its memorandum of decision in the 2006 action, the court found that "the alleged breach of contract in count one is the failure by [the plaintiffs] to pay to the [defendant] its 50 percent of cash flow distributions . . . after all the Pascarella priority payments had been made. . . . [T]he payment of all Pascarella priority payments [was] completed in mid-2003."

[26] Also unavailing is the plaintiffs' suggestion that the defendant breached the agreement when Silver failed to repay the promissory note in 1999. Unlike the promissory note, the agreement does not contain any provision that obligates Silver or the defendant to make payment on that note. Rather, it merely acknowledges the existence of that separate contract between Silver and Riversedge Partners and grants the plaintiffs the "option . . . to equitably reduce or charge [the defendant's interest under the agreement] to compensate [the plaintiffs] for such non-payment." As the court in the

2006 action found, the agreement "provides the [plaintiffs] with two specific remedies for nonpayment of the [promissory note] . . . . The specified remedy . . . is . . . to 'charge' or lien or impose a trust on future distributions to recoup the nonpayment." In rendering judgment in favor of the defendant in the 2006 action, the court stated that, "[b]ecause there is no setoff or counterclaim pleaded, the court makes no order with regard to the unpaid balance of the $200,000 promissory note . . . made by [Silver] and guaranteed by the [defendant] in favor of the [plaintiffs]."

[27] For that reason, the Restatement (Second) of Contracts, in discussing the "[e]ffect of repudiation," specifically references §§ 24 and 26 of the Restatement (Second) of Judgments in noting that "[a]n injured party who has a claim for damages for total breach as a result of a repudiation, and who asserts a claim merely for damages for partial breach, *runs the risk* that if he prevails he will be barred under the doctrine of merger from further recovery, even in the event of a subsequent breach, because he has 'split a cause of action.' " (Emphasis added.) 2 Restatement (Second), Contracts § 243, comment (b), pp. 252–53 (1981). Such a "risk" necessarily implies that claim preclusion is a possibility—but not a certainty—when a party asserts a claim for partial breach following a repudiation by the opposing party. See *United States* v. *Paxton*, 422 F.3d 1203, 1206 (10th Cir. 2005) ("[r]isk is by definition probable not certain; hence potential rather than actual" (internal quotation marks omitted)), cert. denied, 546 U.S. 1201, 126 S. Ct. 1403, 164 L. Ed. 2d 103 (2006); *Commonwealth* v. *Coggeshall*, 473 Mass. 665, 668, 46 N.E.3d 19 (2016) ("[r]isk is defined as the possibility of loss [or] injury" (internal quotation marks omitted)).