UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

LIBERTY ENTERPRISES, LLC — CASE NO. 03-63074

Debtor — Chapter 11

LIBERTY ENTERPRISES, LLC

Plaintiff

vs. — ADV. PRO. NO. 03-80356

ROLAND ADAMSONS, AIJA ADAMSONS AND RIGA FARMS, INC.

Defendants

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,

CONCLUSIONS OF LAW, ORDER AND RECOMMENDATION

Under consideration by the Court is a motion ("Motion") filed by Riga Farms, Inc. and Roland and Aija Adamsons (the "Defendants") on October 8, 2004, seeking judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated in Rule 7012(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), in the adversary proceeding commenced by Liberty Enterprises, LLC ("Debtor" or "Plaintiff") on September 16, 2003. A reply in opposition, as well as a cross-motion for partial judgment on the pleadings, was filed on behalf of the Debtor on October 21, 2004. The Defendants filed their reply to Debtor's cross-motion on October 25, 2004.

A hearing on the motions was held in Utica, New York, on October 26, 2004. Both parties were afforded an opportunity to submit memoranda of law. The matter was submitted for decision on November 19, 2004.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of the motion in this adversary proceeding, except as hereinafter set forth, pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), (b)(3) and (c)(1).

FACTS

A land contract ("Land Contract") was executed by the Debtor and the Defendants on

May 17, 1999, which provided for monthly payments by the Debtor over a period of five years.[1] On November 23, 2001, the Debtor filed a complaint against the Defendants in New York Supreme Court, County of Herkimer ("State Court"), seeking specific performance of the Land Contract. The Defendants filed an answer and a counterclaim seeking to foreclose on real property located at Rock Hill Road in the towns of German Flatts and Warren in Herkimer County, New York, which was the subject of the Land Contract (the "Subject Property"), based on the Debtor's alleged default. On November 20, 2002, the State Court granted summary judgment to the Defendants and entered an Order of Foreclosure, which included the appointment of a referee "to ascertain the amount due to defendants, including a computation of costs and attorney's fees." The State Court dismissed the Debtor's action seeking specific performance." *See* Exhibit C of the Devine Affirmation. On March 21, 2003, the State Court entered a Judgment of Foreclosure and Sale ("Foreclosure Judgment"), which required that the Subject Property be sold at public auction and that all taxes, assessments and water rates be paid from the proceeds. *See* Exhibit D of Devine Affirmation. It also provided that the Defendants "add to the amount due any and all advances made by the Defendants for taxes and insurance premiums or other advances necessary to preserve the property," which may not have been included in the Referee's Report. *Id.* The Foreclosure Judgment specifically provided for $450 in costs and disbursements to the Defendants and $311,503.88, the amount due to the Defendants pursuant

[1] The Court assumes familiarity with its earlier decision in this case involving the same parties, which provides some of the factual background set forth herein. *See In re Liberty Enterprises, LLC,* Case No. 03-63074 (Bankr. N.D.N.Y. March 26, 2004).

to the Referee's Report,[2] as well as $19,186.64, identified as "the reasonable value of the attorney's fees and expenses incurred by the Defendants which sums shall be added to and made a part of the Judgment herein." *Id.*[3] The foreclosure sale was scheduled for May 5, 2003. The Debtor filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), on May 2, 2003.

As noted previously, the Debtor commenced an adversary proceeding in this Court by the filing of a complaint on September 16, 2003. On September 19, 2003, the Debtor filed an amended complaint, which included a jury demand.[4] The Debtor's first cause of action seeks to avoid the Foreclosure Judgment as a preference pursuant to Code § 547. The Debtor's second cause of action seeks to recover damages for breach of contract on the basis that the Defendants allegedly failed to act reasonably to close on the Land Contract prior to September 2001 and failed to "adhere to the implied covenant of good faith and fair dealing" in connection with the

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[2] This amount was comprised of principal, interest, taxes and insurance "and all other items under the said Land Contract Agreement, as of January 17, 2003." *See* Exhibit attached to Debtor's Opposition, filed October 21, 2004 (Referee's Report of Amount Due, dated January 14, 2003).

[3] According to the language of the Order Granting Summary Judgment and Referral, the Debtor consented to the order of foreclosure but contested any award of attorney's fees. *See* Exhibit C of Affirmation of Terence J. Devine, Esq. in Support of the Defendants' Motion, dated October 8, 2004 ("Devine Affirmation"). On November 19, 2004, the Appellate Division of the New York State Supreme Court for the Fourth Department modified the judgment of foreclosure by vacating the award of attorneys' fees and remitting the matter back to the State Court for a hearing on the proper amount of attorneys' fees. The appellate court made a finding that under the terms of the Land Contract, Defendants were only entitled to recover attorneys' fees in connection with their counterclaims, not those incurred in connection with the defense of the Debtor's complaint. *See Liberty Enterprises, LLC v. Adamsons*, 2004 WL 2651195, 785 N.Y.S.2d 252 (N.Y. App. Div. Nov. 19, 2004).

[4] In a letter to the Court, dated August 11, 2004, Debtor's counsel indicated that the Debtor wished to withdraw its request for a jury trial.

Land Contract. The Defendants filed their answer to the amended complaint in the adversary proceeding on October 14, 2003, and on October 8, 2004, filed the Motion presently under consideration by this Court.

DISCUSSION

In considering a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c), the Court must accept all allegations in the complaint as true and draw all inferences in favor of the non-moving party. *See Patel v. Contemporary Classics of Beverly Hills,* 259 F.3d 123, 126 (2d Cir. 2001). In order to succeed on a 12(c) motion, the Defendants must establish that there are no material issues of fact that need to be resolved. Like motions pursuant to Fed.R.Civ.P. 56, a motion pursuant to Fed.R.Civ.P. 12(c) is designed to resolve claims on the merits and, as such, often is treated like a motion for summary judgment if it is appropriate for the Court to consider documents outside the pleadings. *See generally, Breeden v. Tricom Business Systems, Inc.*, 244 F. Supp. 2d 5, 12 (N.D.N.Y. 2003).

The Court will consider the Defendants' request for judgment on the pleadings, addressing each of the Debtor's two causes of action separately:

First Cause of Action seeking to Avoid the Foreclosure Judgment as a Preference

The Debtor contends that the issuance of the Foreclosure Judgment within ninety days of the commencement of the case constituted a preferential transfer that should be avoided pursuant to Code § 547. It contends that the Foreclosure Judgment "not only awarded the

Defendants the unpaid principal and interest due under the land sales contract, it also awarded Defendants thousands of dollars in other expenses in the form of allegedly unpaid taxes and insurance and awarded Defendants almost $20,000.00 in attorney fees, along with applicable costs and disbursements." *See* Debtor's Opposition at 3.

"It is well settled that a party purchasing real property pursuant to a land contract is vested with equitable title[5] to that property upon the execution of that contract." *Hogan v. Weeks*, 178 A.D.2d 968, 579 N.Y.S.2d 777 (N.Y. App. Div. 1991); *Heritage Art Galleries, Ltd. v. Raia*, 173 A.D.2d 441, 570 N.Y.S.2d 67, 68 (N.Y. App. Div. 1991). Thus, the seller of the real property holds the legal title in trust for the purchaser and has an equitable lien on the real property for the payment of the purchase price. *Bean v. Walker*, 95 A.D.2d 70, 72 (N.Y. App. Div. 1983). Upon default under the terms of a land contract by the purchaser, the legal owner of the real property cannot simply proceed with eviction but, instead, must first extinguish the equitable owner's interest through foreclosure. *Id.* at 74; *see also Heritage Art Galleries*, 173 A.D.2d at 441 (indicating that in order for the legal owner of the premises to enforce its rights, it had to proceed to foreclose the purchaser's equitable title and could not simply proceed with an action in ejection); *Duke v. Werbalowsky*, 115 A.D.2d 947, 497 N.Y.S.2d 524 (N.Y. App. Div. 1985) (noting that the purchaser was entitled to possession of the real property until foreclosure of its equitable title). Under state law, a judgment of foreclosure grants the legal owner not only his/her property but also any improvements that may have been made to the premises by the prospective purchaser. However, as pointed out by the court in *Bean*, because the purchaser

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[5] "Equitable title" is defined as "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." BLACK'S LAW DICTIONARY at 1523 (8th ed. 2004).

holding equitable title was entitled to any increase in value of the property, "the interest of the parties here can only be determined by a sale of the property after foreclosure proceedings with provisions for disposing of the surplus or for a deficiency judgment." *Bean,* 95 A.D.2d at 75.

The question before this Court is whether, as a matter of law, in obtaining the Foreclosure Judgment, which provided for the ultimate sale of the Subject Property, a preferential transfer of property of the Debtor occurred which can be avoided pursuant to Code § 547. The fundamental inquiry for the Court in this case is whether there was a transfer of the Debtor's equitable interest in the Subject Premises as a result of the Foreclosure Judgment which resulted in a depletion of the Debtor's estate from which creditors might, otherwise, have sought payment of their claims. *See In re Moses*, 256 B.R. 641, 645 (10th Cir. BAP 2000).

Generally, "a judgment entered within the preference reach back period arising out of the enforcement of a valid and subsisting lien, which has priority over claims of general creditors and against which the trustee cannot assert a paramount right, does not constitute an avoidable preference." *In re Roxrun Estates, Inc.*, 74 B.R. 997, 1004 (Bankr. S.D.N.Y. 1987); *see also In re Chapman*, 99 F. 395, 397 (N.D. Ga. 1900) (noting that a lien obtained by contract more than five years prior to the bankruptcy was not a preference and any judgment foreclosing that lien "would not be a preferential proceeding under the bankruptcy act").

In *Roxrun Estates*, the townhouse village association held a lien on the debtor's unimproved parcel of land in a development pursuant to an Offering Statement and Declaration of Covenants, Conditions and Restrictions of Roxbury Run Village. The Declaration required that each owner pay annual maintenance assessments, property tax assessments and any special

assessments, "'together with interest, costs and reasonable attorney's fees shall be a charge on the land and shall be a continuing lien upon the property . . . .'" *Roxrun Estates*, 74 B.R. at 1000. In response to the debtor's default in payment, on May 2, 1985 the association commenced a foreclosure action and on October 1, 1986, an order and judgment of foreclosure and sale was entered. *Id.* The debtor appealed and was granted a stay of the sale pending appeal, conditioned on the debtor posting a $100,000 bond. Rather than post the bond, the debtor filed a chapter 7 petition hours before the scheduled sale. The association sought relief from the automatic stay pursuant to Code § 362(d). At the hearing on the motion, the chapter 7 trustee for the first time raised the argument that the judgment of foreclosure constituted a voidable preference which he intended to set aside. *Id.* at 1001.

In analyzing the trustee's argument, the court in *Roxrun Estates* found that the lien did not arise from the judgment of foreclosure and that "[t]he foreclosure action was only a means to enforce an already existing lien." *Id.* at 1004. The court in *dicta* found that the judgment could not have been set aside as a preference because the association had "obtained no priority over general unsecured creditors by virtue of the judgment." *Id.* at 1004.

The court in *Chapman* drew a distinction between the plaintiff's seeking to enforce the judgment against the real property on which she held a contract lien based on a deed which had been executed to secure a promissory note and her seeking to enforce a general judgment, which she had also obtained. *Id.* The court pointed out that she was

> only seeking for the time being to enforce the judgment against the property on which she had the contract lien, and the bankruptcy act could never have contemplated that a person should be adjudged a bankrupt for permitting the enforcement of a lien against particular property, when the lien as to that property was in no sense a preference under any of the provisions of the

act.

Id.

At the hearing on October 26, 2004, Debtor's counsel argued that in the event there was a deficiency following the sale of the Subject Property, a lien on other real property belonging to the Debtor in Herkimer County would be created that did not exist prior to the Foreclosure Judgment. In response to the latter assertion, Defendants' counsel responded that they were not seeking to create a lien on any other real property in Herkimer County owned by the Debtor.

Under New York law, the remedy of foreclosure is an equitable one that allows the Defendants to foreclose on their lien against only the property subject to the Land Contract. As in the case of a mortgage foreclosure action, leave of court is necessary in order for the Defendants to recover any deficiency. *See generally, New York Trap Rock Corp. v. Ussher*, 271 A.D.2d 842, 843 (N.Y. App. Div. 2000). In this case, the Foreclosure Judgment expressly provides that after the sale of the Subject Property and application of the proceeds to the debt, it was necessary that the Defendants file a separate motion for a deficiency judgment pursuant to § 1371 of the Real Property Action and Proceedings Law. *See* Foreclosure Judgment at 5. In order for the Defendants to obtain a deficiency judgment which arguably would create a lien on other real property belonging to the Debtor, it would be necessary to seek relief from the automatic stay.

Under these circumstances, the Court concludes that the entry of the Foreclosure Judgment does not constitute a preferential transfer, and judgment on the pleadings with respect to the Debtor's first cause of action must be granted. In relying on the conclusions in *Foxrun* and

Chapman, the Court recognizes that there is a factual distinction between those cases and the matter presently before the Court. In the matter *sub judice*, the Defendants not only hold an equitable lien on the Subject Property, they also hold legal title to it. In the Court's view, this presents a more compelling reason for concluding that the Foreclosure Judgment did not give Defendants priority over the Debtor's general unsecured creditors that did not exist before its entry given their lien on the Subject Property, which arose in May 1999 and the fact that the Defendants also hold legal title to it.

Second Cause of Action seeking Damages for an Alleged Breach of Contract

A. *Jurisdiction of the Court*

The Defendants contend that the Debtor's second cause of action based on breach of contract is barred by *res judicata*. However, before the Court can address this argument, it must determine the extent of its jurisdiction over this particular cause of action.

The Court's subject matter jurisdiction is defined in 28 U.S.C. §§ 157 and 1334. *See Plaza at Latham Associates v. Citicorp North America, Inc.*, 150 B.R. 507, 510 (N.D.N.Y. 1993). This Court has subject matter jurisdiction with respect to (1) cases "under title 11,' (2) civil proceedings "arising under title 11," (3) civil proceedings "arising in" a case under title 11 and (4) civil proceedings "related to" a case under title 11. *See* 28 U.S.C. § 157(a). "Bankruptcy judges *may hear and determine* all cases under title 11 and all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments. . . ." 28 U.S.C. § 157(b)(1) (emphasis added).

> A bankruptcy judge may also hear non-core proceedings that are otherwise related to a title 11 case. In such a proceeding,

> however, the bankruptcy judge may not *determine* the issue, but may only submit proposed findings of fact and conclusions of law to the district court.

In re Best Products Co., Inc., 68 F.3d 26, 30 (2d Cir. 1995), citing 28 U.S.C. § 157(c)(1).

Section 157(b)(3) authorizes the bankruptcy judge to make a determination whether a proceeding is a "core" proceeding or otherwise "related to" the bankruptcy case. In this regard, a review of the legislative history of 28 U.S.C. § 157 supports the conclusion that Congress intended "a broad interpretation of the parameters of a core proceeding." *See id.* at 31, citing *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir.), *vacated sub nom. Insurance Co. of State of Pennsylvania v. Ben Cooper, Inc.,* 498 U.S. 964 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991). The fact that the resolution of the matter may be impacted by state law does not prevent the bankruptcy court from finding that it is a core matter. *See* 28 U.S.C. § 157(b)(3). Indeed, the Second Circuit has made it clear that "bankruptcy courts are not precluded from adjudicating state law claims when such claims are at the heart of the administration of the bankruptcy estate." *Ben Cooper*, 896 F.2d at 1399.

There is an argument to be made that the second cause of action is core as it involves the "adjustment of the debtor-creditor relationship . . ." 28 U.S.C. § 157(b)(2)(0)). However, it is important to recognize that "[t]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages . . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

The Court's main focus of inquiry must be on whether the essence of the proceeding is "'at the core of the federal bankruptcy power.'" *S.G. Phillips Constructors*, 45 F.3d 702, 707 (2d

Cir. 1995), quoting *Marathon Pipeline,* 458 U.S. at 71. In making a determination of whether to classify a proceeding involving a prepetition contract as core, courts have examined "(1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization." *In re U.S. Lines, Inc.,* 197 F.3d 631, 637 (2d Cir. 1999). In this case, the Land Contract was executed prepetition in May 1999.

The second part of the analysis depends on the "nature of the proceeding." *See id.* "Proceedings can be core by virtue of their nature if either "(1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings . . . or (2) the proceedings directly affect a core bankruptcy function . . . ." *Id.* (citations omitted). Clearly, the second cause of action is not unique to the bankruptcy proceeding. The real issue is the extent to which it will directly affect the restructuring of the Debtor's relations with its creditors, including the Defendants.

The second cause of action is based on the Debtor's allegations that the Defendants breached the implied covenant of good faith and fair dealing under the Land Contract when they allegedly failed to act reasonably in closing on the Land Contract prior to September 11, 2001. *See* ¶ 21 of the Debtor's Amended Complaint. As a result, the Debtor asserts that it has been damaged (1) by having to file a chapter 11 petition with its associated costs and attorneys' fees; (2) by having to mortgage its other real property at an "exorbitant" interest rate; and (3) by having incurred costs and attorneys' fees in defending against the Defendants' foreclosure action in State Court. *See id.* at ¶ 22. The Court concludes that even if the Debtor was successful in establishing a breach of an implied covenant under the Land Contract, any award of damages would simply offset the claim of the Defendants in excess of $311,000, as set forth in the Foreclosure Judgment. The possibility that the estate will have more assets to distribute to other

creditors if the Debtor prevails is not sufficient to give this Court core jurisdiction. *In re Sokol*, 60 B.R. 294, 296 (Bankr. N.D.Ill. 1986). Under these circumstances, the Court concludes that the second cause of action is not a core proceeding. It must then consider whether it is related to the bankruptcy case.

In *In re Turner*, 724 F.2d 338, 340-41 (2d Cir. 1983), the Second Circuit Court of Appeals held that in order to be found to be "related to," the proceeding must have a "significant connection" to the debtor's bankruptcy case. The Second Circuit subsequently "liberalized" its position in this regard in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992), in which it indicated that "[t]he test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *See id.* at 114 (citations omitted).

The Court indicated above that the possibility that there would be more assets available to other creditors if the Debtor was to prevail on its second cause of action was insufficient to give it "core" jurisdiction. However, the Court finds that if the Debtor were to be successful with its second cause of action, it is conceivable that it would impact on the Debtor's ability to reorganize in that any recovery of damages against the Defendants would be offset against their claim against the Debtor. Reduction of Defendants' claim, in turn, would potentially increase the dividend available to other creditors.[6] It is this "conceivable effect" which causes the Court

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[6] The bar date for filing proofs of claim was December 8, 2003. The Defendants filed their proof of claim on December 5, 2003, in the amount of $340,601.12. A proof of claim was also filed on behalf of American Business Credit, Inc., the only other secured creditor listed in the Debtor's petition, with the exception of the Herkimer County Treasurer, in the amount of $600,400.19. According to Schedule F, filed by the Debtor in this case, there are only three unsecured creditors with claims totaling $14,298.

to conclude that the second cause of action is "related to" the bankruptcy case. Therefore, the Court will submit its recommendations in the form of proposed findings of fact and conclusions of law to the District Court for final determination pursuant to 28 U.S.C. § 157(c)(1).

B. *Proposed Findings of Fact and Conclusions of Law as regards the Debtor's Second Cause of Action*

The doctrine of *res judicata* or claim preclusion prohibits a party from relitigating any claim which could have been or which should have been litigated in a prior proceeding. "Pursuant to the doctrine of *res judicata*, 'once a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" *Tricom Business Systems*, 244 F. Supp. 2d at 13, quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158 (N.Y. 1981). The doctrine "rests upon the all important principle '[t]hat justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation on that question, and between the parties, should be closed forever.'" *Tricom Business Systems*, 244 F. Supp. 2d at 13, quoting *Ryan v. New York Telephone Company*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487 (N.Y. 1984).

In the action in State Court, the Debtor's request for specific performance of the Land Contract was dismissed by Order dated November 20, 2002. At the hearing before this Court on October 26, 2004, in response to the Defendant's assertion of *res judicata*, Debtor's counsel argued that the Debtor had not sought damages pursuant to an action for breach of contract

because such relief would have been contrary to its seeking specific performance[7] and, therefore, *res judicata* is inapplicable to its second cause of action in the instant adversary proceeding.

Section 3014 of the New York Civil Practice Law and Rules permits a party to assert a claim for relief even though it may contradict the underlying theory of the complaint. *See Cohn v. Lionel Corp.*, 21 N.Y. 2d 559, 563, 289 N.Y.S.2d 404, 236 N.E. 634 (N.Y. 1968). The case law is replete with examples of pleadings made in the alternative, asserting both a cause of action for specific performance, or alternatively, for damages for breach of contract. *See, e.g. Cointech, Inc. v. Masaryk Towers Corp.*, 7 A.D.3d 376, 777 N.Y.S.2d 76 (N.Y. App. Div. 2004), *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, LLP v. Island Properties, LLC,* 307 A.D.2d 953, 763 N.Y.S.2d 481 (N.Y. App. Div. 2003); *Capa Partners Ltd. v. E-Smart Technologies, Inc.*, 2004 WL 2642248 (N.Y. Sup. Ct. Nov. 15, 2004).

The Debtor relies on the case of *Gall v. Gall*, 17 A.D. 312 (N.Y. App. Div. 1897) in arguing that the dismissal of the Debtor's cause of action based on specific performance did not bar it from seeking damages in a separate action. However, a reading of *Gall* makes it clear that it is to be distinguished from the case herein. In *Gall* the plaintiff sought specific performance of an alleged agreement by the defendants' intestate, Joseph Gall, to make a will in favor of the plaintiff in return for certain services, including relocating from California to New York, adopting Joseph Gall's last name and entering into his business. Plaintiff was requesting that the property of which Joseph Gall died seized should be transferred to him as had been their

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[7] One of the factors in seeking relief in the form of specific performance is an assertion that the plaintiff does not have an adequate remedy under law. *See Piga v. Rubin*, 300 A.D.2d 68, 751 N.Y.S.2d 195 (N.Y. App. Div. 2002), *lv. denied* 99 N.Y.2d 646, 760 N.Y.S.2d 95, 790 N.E.2d 269 (N.Y. 2003).

agreement. *Id.* at 314. The court found that there was no contract between the plaintiff and Joseph Gall that could be specifically performed. *Id.* Plaintiff then commenced an action for a money judgment for the value of the services he performed. *Id.* The court, in addressing the defendants' defense that the second action was barred by the judgment in the first action, focused on the purpose for which the two actions were brought and whether the evidence to establish each one is the same. *Id.* at 316. The court then noted that the first action raised the question of whether there was an agreement by Joseph Gall to make a will in favor of the plaintiff. *Id.* at 317. The court noted that the value of services performed by the plaintiff was immaterial or at least of secondary importance to the determination in the first action. *Id.* "[T]he services themselves and their rendition lay at the basis of the [second] action." *Id.* at 318. Accordingly, the court found that the "causes of action were not identical and that the judgment in the first case was a bar only as to those facts which were necessarily litigated in the former action, if there were any such facts." *Id.*

In the matter presently under consideration by this Court, the Debtor sought specific performance of the Land Contract in State Court. The second cause of action which it now presents to this Court is based on an alleged breach of the Land Contract and directly relates to the same agreement between the parties. As such, the Debtor should and could have pled in the alternative its cause of action based on alleged breach of contract in the State Court. Having failed to do so, *res judicata* bars it now from asserting a claim involving the same parties involved in the State Court action, based on breach of contract, in this Court. *See Hennessy v. Cement and Concrete Worker's Union Local 18A of the Laborer's International Union of North America, AFL-CIO,* 963 F.Supp. 334, 338 (S.D.N.Y. 1997) (noting that "[u]nder New York law,

the transactional approach to res judicata bars a later claim arising out of the same factual grouping as an earlier litigated claim even if the later claim is based on different legal theories or seeks dissimilar or additional relief.'" (citation omitted)).

Accordingly, the Court concludes that the Debtor's second cause of action based on an alleged breach of contract is barred by *res judicata* as it could have been asserted in the State Court by the Debtor, along with its request for specific performance of the Land Contract.

Based on the foregoing, it is hereby

ORDERED that with respect to the Debtor's first cause of action based on Code § 547(b), judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is granted to the Defendants with respect to the Subject Property and, accordingly, Debtor's cross-motion for judgment on the pleadings, is denied; and it is further

RECOMMENDED to the United States District Court for the Northern District of New York that with respect to the Debtor's second cause of action based on allegations of breach of the Land Contract, judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) also be granted to the Defendants.

Dated at Utica, New York

this 13th day of January 2005

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge