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JAMES E. BARBARA ET AL. *v.* COLONIAL
SURETY COMPANY
(AC 44836)

COLONIAL SURETY COMPANY *v.* PHOENIX
CONTRACTING GROUP ET AL.
(AC 45267)

Bright, C. J., and Prescott and Suarez, Js.

Syllabus

In two separate actions arising out of a hotel construction project in New York, C Co., a commercial surety company, in one action, sought to enforce an indemnity agreement against P Co. and its individual principals, J and L, and, in a second action, the individual principals sought to invalidate the indemnity agreement, asserting breach of contract and bad faith claims. P Co., as a subcontractor, executed a trade subcontract with G Co., the general contractor for the hotel project, to supply and install exterior window walls for the building. The individual principals and P Co. executed the general indemnity agreement in favor of C Co. as consideration for the issuance of payment and performance bonds for the hotel project on behalf of P Co., as principal, and in favor of G Co., as obligee. Pursuant to the indemnity agreement, P Co. and the individual principals agreed to indemnify C Co. for any losses that C Co. might incur from issuing the bonds on behalf of P Co., granted C Co. the authority to settle any claims on the bonds, assigned to C Co. all their rights in and to the subcontract, and appointed C Co. as their attorney-in-fact with the right to exercise all of the rights assigned to C Co. in the indemnity agreement. Soon after construction began, issues arose with the hotel project, and G Co. and P Co. both denied responsibility for the resulting delay. P Co. ultimately completed the subcontract work, and shortly thereafter G Co. terminated the subcontract, citing P Co.'s failure to pay costs associated with the delay in installing the window walls and for work performed by P Co.'s sub-subcontractors. G Co. subsequently brought an action against C Co. and P Co. in New York, alleging that P Co. breached the subcontract and that C Co. breached the performance bond, and C Co. brought its action in Connecticut to enforce the indemnity agreement. Approximately three months after the litigation began, C Co. demanded, pursuant to the indemnity agreement, that P Co. and the individual principals indemnify C Co. for the expenses it had incurred in defending against G Co.'s claims and that they deposit collateral security in the amount of \$2 million with C Co. In response, L, on behalf of P Co. and the individual principals, sent C Co. a letter stating that they did not have the financial resources to meet C Co.'s demands. C Co. then notified P Co. and the individual principals that their refusal to indemnify C Co. and to deposit collateral in the amount requested constituted a breach of the indemnity agreement. C Co. subsequently entered into a settlement agreement with G Co. and the third-party defendants in the New York action, in which all parties agreed to release all pending claims in the New York action, including claims asserted by P Co. in its counterclaims and third-party complaints. C Co. then filed a motion to enforce the settlement agreement, and P Co. filed a memorandum in opposition, arguing that C Co. settled the action in bad faith. The New York court granted the motion to enforce the settlement over P Co.'s objection. The individual principals then brought their action against C Co. in Connecticut in connection with its handling of the New York action. C Co. filed a motion for summary judgment in its indemnity action, in which P Co. had been defaulted for failing to appear, claiming that there was no genuine issue of material fact that P Co. and the individual principals executed and then breached the indemnity agreement by failing and refusing to indemnify C Co. and that C Co. had suffered damages due to the breach. C Co. later moved for summary judgment in the individual principals' action, asserting that their claims were barred by the doctrines of res judicata and collateral estoppel. After a hearing, the trial court granted C Co.'s

motion for summary judgment in the indemnity action but denied C Co.'s motion for summary judgment in the individual principals' action, and the individual principals and C Co. filed separate appeals to this court. *Held*:

1. The individual principals could not prevail on their claim that the trial court improperly rendered summary judgment for C Co. on its claim for contractual indemnification: because C Co. satisfied the prima facie evidence and right-to-settle provisions of the indemnity agreement by submitting an affidavit from its president that included an itemized statement of the losses, costs and expenses incurred by C Co. in connection with the bonds, the burden shifted to the individual principals to raise a genuine issue of material fact as to whether C Co. had acted in bad faith in incurring those expenses and/or settling the New York action, and, although the individual principals argued that a fair and reasonable fact finder could find that it was unreasonable for C Co. to incur significant expenses without first testing G Co.'s claims through a motion to dismiss in the New York action and that C Co. settled the New York action solely to protect its own self-interest, in light of the existence of issues of fact surrounding the performance bond conditions and the individual principals' admitted insolvency in their letter refusing C Co.'s demand for collateral, the individual principals failed to demonstrate that C Co.'s decision to settle the New York action, rather than moving to dismiss it, was an unreasonable exercise of the discretion C Co. was afforded under the indemnity agreement; moreover, the individual principals introduced no evidence of an improper motive or a dishonest purpose with regard to C Co.'s self-interested settlement of the performance bond claim in New York, that settlement having protected both C Co. and P Co. from the possibility of a substantially larger judgment and further litigation costs, and self-interest is not itself evidence of an improper motive and does not necessarily constitute a per se violation of the implied covenant of good faith and fair dealing; furthermore, the individual principals had the option under the indemnity agreement to notify C Co. that they wanted it to defend the claims against the bonds and simultaneously deposit collateral with C Co. sufficient to cover those claims, but they failed to do so.
2. C Co. could not prevail on its claim that the trial court improperly denied its motion for summary judgment and improperly concluded that the individual principals' claims were not precluded by the doctrines of res judicata and collateral estoppel: this court concluded that res judicata did not apply because the proceeding in the New York action did not provide the proper forum for the individual principals to adequately litigate their bad faith claims, it was clear that the New York court ignored the defenses related to C Co.'s separate right to indemnification, to which issues of bad faith may be relevant, and, thus, whether C Co. acted in good faith in settling the New York action was irrelevant to the New York court's determination as to whether C Co. had the authority to do so; moreover, because C Co.'s indemnity action was pending in Connecticut when C Co. sought to enforce the settlement agreement in the New York action, there was no question that there was another, more appropriate forum in which P Co. could have raised its claims related to C Co.'s right to indemnification; furthermore, the doctrine of collateral estoppel did not preclude the individual principals' claims in their separate action, as this court, having concluded that the individual principals did not have an adequate opportunity to litigate their bad faith claims in the New York action, also concluded that it necessarily followed that those issues were not actually decided in that proceeding.

Argued April 3—officially released August 22, 2023

Procedural History

Action, in the first case, to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, and action, in the second case, for, inter alia, indemnification, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the named defendant was defaulted for failure to appear; thereafter, both cases were transferred to

the Superior Court in the judicial district of Waterbury, Complex Litigation Docket, where the court, *Bellis, J.*, denied the motion for summary judgment filed by the defendant in the first case and granted the motion for summary judgment filed by the plaintiff in the second case and rendered judgments thereon, from which the defendant in the first case and the defendant Lina T. Barbara et al. in the second case filed separate appeals to this court. *Affirmed.*

Steven Lapp, with whom was *Karen L. Dowd*, for the appellant in Docket No. AC 44836 (defendant) and the appellee in Docket No. AC 45267 (plaintiff).

Christopher G. Brown, for the appellants in Docket No. AC 45267 (defendant Lina T. Barbara et al.) and the appellees in Docket No. AC 44836 (plaintiffs).

Opinion

BRIGHT, C. J. These two appeals involve separate actions arising from the construction of a hotel in New York (hotel project). James E. Barbara and Lina T. Barbara (Barbaras) and their company Phoenix Contracting Group, Inc. (Phoenix), executed a general indemnity agreement (indemnity agreement) in favor of Colonial Surety Company (Colonial) as consideration for the issuance of surety bonds for the hotel project, on which Phoenix was a subcontractor.¹ The general contractor of the hotel project made claims on the bonds against Colonial in New York based on Phoenix's alleged failure to perform (New York action), and Colonial brought an action against Phoenix and the Barbaras in Connecticut to enforce the indemnity agreement (indemnity action). Colonial ultimately settled all claims in the New York action over Phoenix's objection, and the Barbaras brought an action against Colonial in Connecticut, asserting breach of contract and bad faith claims against Colonial in connection with its handling of the New York action and seeking to invalidate the indemnity agreement (Barbaras' action).

In Docket No. AC 44836, Colonial appeals from the denial of its motion for summary judgment in the Barbaras' action, in which it asserted that the Barbaras' claims were precluded pursuant to the doctrines of res judicata and collateral estoppel.² In Docket No. AC 45267, the Barbaras appeal from the judgment of the trial court rendered following the granting of Colonial's motion for summary judgment in the indemnity action.³ On appeal, Colonial claims that the court improperly concluded that the Barbaras' action is not precluded by the doctrines of res judicata and/or collateral estoppel, and the Barbaras claim that the court improperly concluded that they failed to raise a genuine issue of material fact with respect to their allegations that Colonial acted in bad faith in settling the New York action. We affirm the judgments of the trial court.

The records reveal the following facts, viewed in the light most favorable to the Barbaras as the nonmoving parties, and procedural history. Colonial is a commercial surety company that issues payment and performance bonds on behalf of contractors and subcontractors for construction projects. In 2007, Phoenix, as a subcontractor, executed a trade subcontract with Gotham Greenwich Construction Co., LLC (Gotham), the general contractor for the hotel project, to supply and install exterior window walls for the building (subcontract). On May 1, 2008, the Barbaras, both individually and on behalf of Phoenix, executed the indemnity agreement in favor of Colonial.⁴ On May 20, 2008, Colonial, as surety, issued performance and payment bonds⁵ on behalf of Phoenix, as principal, and in favor of Gotham, as obligee, to secure Phoenix's obligations under its subcontract with Gotham (Gotham bonds).

Pursuant to the indemnity agreement, Phoenix and the Barbaras (1) agreed to indemnify Colonial for any losses that Colonial might incur from issuing the Gotham bonds on behalf of Phoenix, (2) granted Colonial the authority to settle any claims on the Gotham bonds and assigned to Colonial all their rights in and to the subcontract, and (3) appointed Colonial as their attorney-in-fact “with the right but not the obligation, to exercise all of the rights assigned” to Colonial in the indemnity agreement.⁶

Soon after construction began, issues arose with the hotel project, and Phoenix was unable to begin its work until the spring of 2009. Gotham and Phoenix both denied responsibility for the resulting delay. In August, 2009, Gotham notified Phoenix and Colonial that it was considering declaring Phoenix in default under the subcontract because Phoenix had failed to perform the work as scheduled. Phoenix, in turn, claimed that Gotham had breached the subcontract and that any delay in Phoenix’s performance was attributable to site conditions caused by Gotham’s other subcontractors. In a letter dated September 1, 2009, and addressed to James Barbara, Gotham identified several issues with Phoenix’s performance under the subcontract, stating that the issues “amplify the failures exhibited by Phoenix in all aspects of the work and these failures are continuing and delaying the overall construction of the project.” Colonial, through its president, Wayne Nunziata, responded to Gotham in a letter dated September 10, 2009, explaining that “there is no default by [Phoenix], and Colonial is not volunteering to take over the project. Moreover, it is Colonial’s understanding that Phoenix . . . acknowledges that additional manpower and installation expertise is now required because of the material changes and resulting problems”

A few months later, in a letter dated January 13, 2010, Gotham stated that “[t]he defaults are continuing. . . . This letter constitutes further notice of Gotham’s intention to terminate your right to complete the [s]ubcontract.” In a letter dated February 17, 2010, Gotham notified Colonial and Phoenix that it was considering declaring Phoenix in default and requested a conference to discuss the subcontract and performance bond. In addition, in March, 2010, one of Phoenix’s subcontractors, United Iron, Inc. (United Iron), notified Colonial that it was making a claim against the payment bond in the amount of \$112,688.37.

Phoenix ultimately completed the subcontract work in August, 2010. Shortly thereafter, in a letter dated September 7, 2010, Gotham terminated the subcontract, citing Phoenix’s failure to pay costs associated with the delay in installing the window walls and for work performed by Phoenix’s sub-subcontractors.

On October 28, 2010, Colonial filed the indemnity

action against Phoenix and the Barbaras in Connecticut. On November 5, 2010, Gotham filed the New York action against Phoenix and Colonial seeking more than \$1 million in damages. Gotham alleged that Phoenix breached the subcontract and that Colonial breached the performance bond. Shortly thereafter, Colonial filed an answer and asserted various affirmative defenses in the New York action. On November 19, 2010, United Iron filed a separate action in New York against Phoenix and Colonial, seeking \$37,877.50 under the payment bond (United Iron action).

Approximately three months after the litigation began, Colonial sent Phoenix and the Barbaras a letter dated February 8, 2011, demanding that they indemnify Colonial for the expenses it had incurred in defending against Gotham's claims against the Gotham bonds and, pursuant to paragraph 7 of the indemnity agreement, that they deposit collateral security in the amount of \$2 million with Colonial. Paragraph 7 of the indemnity agreement provides in relevant part: "If a claim is made against [Colonial], or if [Colonial] deems it necessary to establish a reserve for potential claims, and upon demand from [Colonial], Indemnitor shall deposit with [Colonial] cash or other property acceptable to [Colonial], as collateral security, to protect [Colonial] with respect to such claim or potential claims and any anticipated expense and attorneys' fees. Such collateral security shall be in such amount as [Colonial] in its sole discretion deems appropriate. Such collateral may be held by [Colonial] until it has received satisfactory evidence of its complete discharge from such claim or potential claims, and until it has been fully reimbursed for all losses, expenses, fees, and paid all premiums due. . . ."

Lina Barbara, on behalf of the Barbaras and Phoenix, responded by letter dated February 18, 2011, stating that "we don't have the financial resources to meet your demands."⁷ Colonial replied to Phoenix and the Barbaras in a letter dated March 8, 2011, notifying them that their refusal to indemnify Colonial and to deposit collateral in the amount requested constituted a breach of the indemnity agreement.

In May, 2011, after Gotham amended its complaint in the New York action to increase its claim to \$3.5 million, Phoenix, through its attorney Lina Barbara, who is licensed to practice law in New York under the name Lina Tang, filed an answer and asserted counterclaims against Gotham. In September, 2011, Phoenix filed third-party complaints against Gotham's surety, Travelers Casualty & Surety Company of America (Travelers), Gotham's parent company, Gotham Construction Company, LLC (Gotham Construction), and the owner of the hotel project, Sochin Downtown Realty, LLC (Sochin) (collectively, third-party defendants). On December 18, 2012, the United Iron action was discon-

tinued by stipulation of the parties.⁸

Meanwhile, in the indemnity action, Phoenix was defaulted for failing to appear on August 28, 2011, and Colonial filed its operative amended complaint on September 9, 2011. The Barbaras filed an answer and asserted several special defenses, but the court, *B. Fischer, J.*, granted Colonial's motions to strike their special defenses.⁹

In April, 2015, Colonial, for itself and as attorney-in-fact for Phoenix, entered into a "settlement and release agreement" with Gotham and the third-party defendants (settlement agreement). Pursuant to the settlement agreement, Colonial agreed to pay Gotham \$100,000 "as full and final resolution and satisfaction of any and all claims" arising from the hotel project, Phoenix's subcontract, and/or the Gotham bonds. All parties agreed to release all pending claims in the New York action, including those claims asserted by Phoenix in its counterclaims and third-party complaints.

Shortly thereafter, in the New York action, Colonial filed a motion to enforce the settlement agreement and to discontinue the New York action with prejudice (motion to enforce the settlement), as well as a supporting memorandum of law. Phoenix filed a memorandum of law in opposition to Colonial's motion to enforce the settlement, arguing that Colonial settled the action in bad faith. Colonial filed a reply to Phoenix's opposition, denying Phoenix's claims. On July 28, 2015, the New York court granted Colonial's motion to enforce the settlement over Phoenix's objection. Phoenix did not appeal from the judgment in the New York action.

In the indemnity action, on June 21, 2016, the Barbaras, pursuant to Practice Book § 10-60 (a) (3), filed a request for leave to reopen the pleadings,¹⁰ amend their answer, add affirmative defenses and counterclaims, and to allow for discovery in the indemnity action. In their request, the Barbaras stated that they had not sought discovery previously in the indemnity action because Phoenix and Colonial had conducted a joint defense in the New York action and engaging in discovery could have "given [Gotham] an advantage over Colonial. Now that [the Barbaras] are aware of Colonial's bad faith and improper motive, [the Barbaras seek] . . . to add affirmative defenses and counterclaims." The Barbaras requested "permission to open up the pleadings, amend [their] answer to add affirmative defenses and to allow [them] the opportunity to counterclaim against [Colonial] for a declaration that the [indemnity agreement] and the [Gotham] bonds are void as a result of [Colonial's] material breaches of both documents and its bad faith actions and that [they] be awarded damages accordingly."

On that same date, the parties appeared before the court, *Hon. Bruce W. Thompson*, judge trial referee, for

a pretrial conference. During that proceeding, Colonial requested an extension of time in which to file an objection to the Barbaras' request to open the pleadings, which the court granted on the record. On July 22, 2016, Colonial filed an objection to the Barbaras' request, arguing, among other things, that the court should deny the request as untimely. Colonial noted that the Barbaras were aware of the settlement agreement in the New York action as of July 28, 2015, and that, although the Barbaras indicated that they would amend their pleadings in the indemnity action to assert counterclaims against Colonial during a pretrial conference on December 17, 2015, they failed to do so for the ensuing six months until the June 21, 2016 pretrial conference. On December 19, 2016, the court, *A. Robinson, J.*, denied the Barbaras' request and sustained Colonial's objection thereto without comment.¹¹ In April, 2017, the Barbaras' action was filed, seeking damages for breach of the indemnity agreement and a declaratory judgment that the indemnity agreement is void.

In the indemnity action, on December 22, 2017, Colonial filed a motion for summary judgment and accompanying memorandum of law as to its indemnification claim along with several documentary exhibits.¹² Colonial claimed that there is no genuine issue of material fact that the Barbaras executed and then breached the indemnity agreement by failing and refusing to indemnify Colonial and that Colonial has suffered damages due to the breach. On February 13, 2018, the Barbaras moved to stay the indemnity action pending a final judgment in the Barbaras' action, and Colonial filed an objection thereto in March, 2018.

In April, 2018, Colonial moved to dismiss the Barbaras' action pursuant to the prior pending action doctrine¹³ or, in the alternative, to stay the Barbaras' action pending a final judgment in the indemnity action. Colonial argued that the Barbaras were attempting to avoid the effect of the court's rulings in the indemnity action striking their special defenses and denying their request for leave to amend their answers and to assert counterclaims. Alternatively, Colonial argued that the court should stay the Barbaras' action "to facilitate the interests of judicial economy, consistency and finality"

On September 24, 2018, while Colonial's motion to dismiss the Barbaras' action was pending, the court, *Abrams, J.*, granted the Barbaras' motion to stay the indemnity action through November 26, 2018. On October 30, 2018, the court, *Stevens, J.*, denied Colonial's motion to dismiss the Barbaras' action, concluding that "the reasonable exercise of the court's discretion warrants a denial of [Colonial's] motion to dismiss under the prior pending action doctrine."¹⁴ The court also determined that "the granting of a stay . . . would be inappropriate and not judicious for similar reasons justi-

fyng the denial of the motion to dismiss.”

On November 19, 2018, Colonial filed an application to transfer the Barbaras’ action to the Complex Litigation Docket. On November 20, 2018, the Barbaras filed their operative amended complaint, which included four counts. In the first three counts, the Barbaras alleged that Colonial breached (1) the indemnity agreement, (2) the implied covenant of good faith and fair dealing, and (3) the performance bond. In the fourth count, they sought a declaratory judgment that the indemnity agreement is void.

On December 6, 2018, the court, *Abrams, J.*, ordered that the Barbaras’ action be transferred to the judicial district of New Haven and consolidated with the indemnity action. On December 19, 2018, Judge Abrams designated the Barbaras’ action and the indemnity action as complex litigation cases and ordered them transferred to the Complex Litigation Docket in the judicial district of Waterbury.

On August 12, 2019, the Barbaras filed affidavits and several supporting exhibits in opposition to Colonial’s December 22, 2017 motion for summary judgment in the indemnity action.¹⁵ The Barbaras claimed that Colonial incurred the expenses and losses for which it sought indemnification in bad faith because “Colonial engaged in years of discovery, incurring substantial legal fees . . . and expenses unnecessarily defending the New York action.” According to the Barbaras, “Colonial knew right from the start of the New York [action] that it had no liability to [Gotham] under the performance bond, yet it remained in the New York [action] instead of making a pre-answer motion for dismissal because it wanted to cut a deal with Gotham for future business.” The Barbaras further claimed that, given that Colonial could have moved to dismiss the New York action, the only possible explanation for its failure to do so “is that Colonial had something else to gain [by remaining] in [the New York] action. . . . Colonial must have gotten a very lucrative deal with Gotham.”

On August 22, 2019, Colonial moved for summary judgment in the Barbaras’ action, asserting that the Barbaras’ claims were barred by the doctrines of res judicata and collateral estoppel. Colonial submitted affidavits from Nunziata and Attorney Steven Lapp, with accompanying exhibits.¹⁶ On October 15, 2019, the Barbaras filed their opposition to Colonial’s motion for summary judgment in the Barbaras’ action. They argued, among other things, that they “were unable to fully and fairly litigate Phoenix’s claims about Colonial’s bad faith actions because when Colonial finally settled the New York [action], Phoenix had no method of obtaining discovery to prove Colonial’s bad faith.”

On November 8, 2019, Colonial filed its reply memorandum, arguing that “[t]he record establishe[d],

beyond dispute, that Phoenix and the Barbaras did, in fact, oppose the motion [to enforce the settlement] by asserting bad faith and breach of contract claims against Colonial and litigating the same through adversarial and contested court proceedings, in which they submitted extensive evidence to support their opposition to the motion [to enforce the settlement].” Colonial also argued that, “despite [the Barbaras’] argument that they and Phoenix had no avenue or method to pursue discovery of evidence to support their opposition to the motion [to enforce the settlement] . . . the Barbaras provide absolutely no evidence that they and Phoenix actually made any attempt in the [New York action] to pursue discovery through any of the [available] procedures and were then refused the opportunity to do so by the court. . . . Accordingly, the opportunity was present, yet Phoenix and the Barbaras made no attempt to use that opportunity to obtain discovery to support the bad faith and breach of contract claims which Phoenix and the Barbaras did, in fact, raise and litigate—albeit unsuccessfully—in opposition to the motion [to enforce the settlement].” (Emphasis omitted; internal quotation marks omitted.)

On February 24, 2020, Colonial filed a reply memorandum in the indemnity action. In support of its reply, Colonial submitted another affidavit from Lapp, as well as the exhibits it had submitted in support of its motion for summary judgment in the Barbaras’ action. Colonial repeated its claims that the Barbaras’ bad faith defense was precluded by the doctrines of res judicata and/or collateral estoppel and, alternatively, that the Barbaras’ “‘bad faith’ theories and arguments . . . amount to nothing more than speculative, conjectural and conclusory accusations that are illogical and frivolous on their face, are not supported by any competent and admissible evidence, are meritless under Connecticut law and the decisions of courts of other jurisdictions, and are precluded by the provisions of the indemnity agreement itself.”

The court held a hearing on Colonial’s motions for summary judgment on March 8, 2021. The court granted Colonial’s motion in the indemnity action on June 23, 2021, and it denied Colonial’s motion in the Barbaras’ action on June 28, 2021.

In the indemnity action, the court concluded that, because Colonial satisfied the prima facie evidence provision in the indemnity agreement by submitting Nunziata’s affidavit, which included an itemized statement of Colonial’s losses and the expenses it incurred in connection with the Gotham bonds, the burden shifted to the Barbaras to raise a genuine issue of material fact as to Colonial’s lack of good faith in making the payments for which it sought indemnification. The court, however, rejected Colonial’s claim that the Barbaras were precluded by the doctrines of res judicata

and collateral estoppel from asserting bad faith.¹⁷

The court then considered the merits of the Barbaras' opposition to Colonial's motion for summary judgment and concluded that they failed to establish a genuine issue of material fact as to their bad faith defense. Colonial subsequently withdrew the remaining counts of its operative complaint and filed a motion for award of interest and entry of judgment on the first count of its complaint. Colonial sought both prejudgment and postjudgment interest. On January 10, 2022, the court granted the motion, rendered judgment for Colonial in the amount of \$2,946,959.26, including \$1,308,134.87 in prejudgment interest, and awarded Colonial postjudgment interest at the rate of 10 percent per annum. On January 31, 2022, the Barbaras appealed from the judgment in the indemnity action.

In the Barbaras' action, the court denied Colonial's motion for summary judgment, concluding that neither collateral estoppel nor *res judicata* applied. Colonial's appeal followed. Additional facts will be set forth as necessary.

Before turning to the parties' claims, we first set forth the applicable standard of review. "Our standard of review as to a trial court's decision to grant a motion for summary judgment is well settled. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact [T]he party moving for summary judgment is held to a strict standard. [The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . A material fact is a fact that will make a difference in the result of the case. . . . Because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stewart v. Old Republic National Title Ins. Co.*, 218 Conn. App. 226, 237–38, 291 A.3d 1051 (2023).

In addition, to the extent that we are required to construe the indemnity agreement, we conclude, and the parties agree, that the contract is unambiguous, and, therefore, "the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *PSE*

Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 290, 838 A.2d 135 (2004).

I

AC 45267

On appeal in the indemnity action, the Barbaras claim that the court improperly rendered summary judgment for Colonial on its claim for contractual indemnification. Specifically, the Barbaras contend that there is a genuine issue of material fact as to whether Colonial acted in bad faith in defending and settling the New York action. We disagree.

The following legal principles regarding indemnity agreements are relevant to the Barbaras' claim. Our Supreme Court has determined that the "application of the implied covenant of good faith and fair dealing to surety indemnity agreements is consistent with our good faith jurisprudence." *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 267 Conn. 302. Accordingly, although the standard right-to-settle provision in an indemnity agreement grants a surety broad discretion in settling claims on a bond, "[a] surety is entitled to indemnification only for payments that were made in good faith." *Id.*, 300. When, as in the present case, the indemnity agreement includes a prima facie evidence provision, "upon a finding that a surety has made a payment to a claimant upon a bond, the burden of proof shifts to the indemnitor to prove that the surety had not made the payment in good faith." *Id.*, 293.

Bad faith in this context requires "an 'improper motive' or 'dishonest purpose' on the part of the surety. This standard is in substantial accord with our definition of bad faith in other contexts. . . . Additionally, this standard preserves a proper balance between affording the surety the wide discretion to settle that it requires, while ensuring that the principal is protected against serious and wilful transgression." (Citation omitted.) *Id.*, 304–305.

After adopting this standard, our Supreme Court explained that bad faith does not require "the improper motive to rise to the level of fraud" and "that, although [it was] not interpreting good faith to mean reasonableness . . . whether a surety's actions were reasonable properly may be considered when analyzing bad faith. Unreasonable conduct can be evidence of improper motive and is a proper consideration where parties are bound by a contract that gives unmitigated discretion to one party." (Citation omitted.) *Id.*, 305.

In the present case, the indemnity agreement includes the following right-to-settle and prima facie evidence¹⁸ provisions: "[Colonial] shall have the right in its sole discretion to determine whether any claims shall be paid, compromised, defended, prosecuted or appealed. . . . [Colonial] shall have the right to incur such expenses in handling a claim as it deems necessary or

advisable . . . and [Colonial's] good faith determination as to the necessity or advisability of any such expense shall be final and conclusive upon Indemnitor. . . . [Colonial] shall have the foregoing rights, irrespective of the fact that Indemnitor may have assumed, or offered to assume, the defense of [Colonial] upon such claim. . . . In any claim or suit hereunder, an itemized statement of the aforesaid loss and expense, sworn to by an officer of [Colonial], or the vouchers or other evidence of disbursement by [Colonial], shall be prima facie evidence of the fact and extent of the liability hereunder of Indemnitor. . . . [Colonial] shall have the right to reimbursement of its expenses, premiums and attorneys' fees hereunder, irrespective of whether any Bond loss payment has been made by [Colonial]." Thus, Colonial's duty of good faith in handling any claims on the Gotham bonds is expressly stated in the indemnity agreement.

Although Colonial is afforded broad discretion in handling any claims against the Gotham bonds, the Barbaras had the right to assert control over the litigation pursuant to paragraph 10 (V) of the indemnity agreement, which provides in relevant part: "If the Undersigned desire that a claim or demand against [Colonial] shall be defended, the Undersigned shall (i) give written notice to [Colonial] to this effect and (ii) simultaneously deposit with [Colonial] cash or collateral satisfactory to [Colonial] in an amount sufficient to cover the claim or demand, interest, and other exposure thereon, to the probable date of disposition. Otherwise, [Colonial] shall have the sole and exclusive right to pay or settle any such claim or demand, and such payment or compromise shall be binding upon the Undersigned and included as a liability, loss, or expense covered by the Undersigned's indemnity obligations." Accordingly, the Barbaras had the option of notifying Colonial that they wanted Colonial to defend the claims against the Gotham bonds and simultaneously deposit collateral with Colonial sufficient to cover those claims, but they failed to do so.

Colonial satisfied the prima facie evidence and right-to-settle provisions by submitting an affidavit from Nunziata that included an itemized statement of the losses, costs and expenses incurred by Colonial in connection with the Gotham bonds. Nunziata explained that Colonial, during its investigation, sought discovery from dozens of entities involved in the hotel project, deposed twenty-one witnesses, and hired a consultant with expertise in construction delay claims and a forensic accounting firm to assist in analyzing and evaluating the various claims in the New York action. Nunziata averred that, "[g]iven the conflicting evidence as to [Gotham's], Phoenix's and Colonial's respective claims and defenses following discovery, the uncertainty as to whether . . . Colonial would prevail on its defenses if there was a trial in the [New York action], and the failure

and confessed inability of Phoenix and [the Barbaras] to indemnify Colonial or provide collateral security to protect against liability on the performance bond, it was advisable for Colonial to participate in mediation in the [New York action] and determine whether it was possible [to] obtain the discharge of its potential liability under the performance bond through settlement.” With respect to the decision to settle the New York action, Nunziata asserted that “Colonial had a good faith belief that absent indemnity and collateral security from Phoenix or [the Barbaras], settlement by Colonial, for itself and on behalf of Phoenix, would be the only way for Colonial to ensure against a large adverse judgment against it while bringing an end to the ongoing loss and damage it was incurring as a result of having to continue its defense in the [New York action], resulting from Phoenix’s and [the Barbaras’] failure to provide collateral security and their failure to indemnify Colonial.”

Accordingly, the burden shifted to the Barbaras to raise a genuine issue of material fact as to whether Colonial acted in bad faith in incurring those expenses and/or settling the New York action. In opposing summary judgment, the Barbaras conceded that they failed to post collateral in accordance with paragraph 10 (V) of the indemnity agreement but claimed that Colonial acted in bad faith by unreasonably incurring expenses in the New York action and by settling both Gotham’s claims and Phoenix’s affirmative claims out of self-interest for the sole purpose of garnering future business from Gotham.

In rendering summary judgment for Colonial, the court reasoned as follows. First, “Colonial’s alleged awareness of all of the potential defenses that the [Barbaras] have listed, including Gotham’s breach of the subcontract and failure to meet conditions precedent in the performance bond, do not impact Colonial’s right to reimbursement of good faith expenses it incurred in connection with the Gotham bonds.

“Second, a series of provisions in the indemnity agreement, to which the [Barbaras] agreed to be subject when they executed [it], preclude the [Barbaras] from challenging Colonial’s discretion to determine how the claims in the [New York action] should have been handled. . . . The indemnity agreement gave the [Barbaras] the option of posting collateral and determining for themselves whether the claims in the [New York action] should have been litigated. . . . Colonial attached a copy of a letter that it sent to Phoenix and the [Barbaras] . . . in which it demanded reimbursement, indemnification, and collateral security as a result of, among other things, the [New York action]. . . . [T]he [Barbaras] refused to indemnify Colonial and deposit collateral security on the ground that they lacked the financial resources to meet Colonial’s demands. The undisputed evidence demonstrates that the [Barbaras],

thus, failed to take advantage of [their rights under] the indemnity agreement.” (Footnotes omitted.)

Finally, after reviewing the representations regarding Colonial’s good faith by Nunziata, the court, in rendering summary judgment for Colonial, concluded that the Barbaras had “not provided admissible evidence substantiating their assertion that Colonial, in bad faith, failed to file a pre-answer motion to dismiss and settled the [New York action] to obtain future business with Gotham, beyond conclusory and speculative statements in their affidavits. Further, this assertion is not based on [their] personal knowledge as required by Practice Book § 17-46. The [Barbaras], therefore, have failed to submit evidence to demonstrate a genuine issue of material fact that Colonial acted with an improper motive or dishonest purpose in its handling of the claims in the [New York action]. Accordingly, the [Barbaras] have failed to raise a genuine issue of material fact as to Colonial’s good faith determination of the advisability and necessity of expenses it incurred in connection with the Gotham bonds.”

On appeal, the Barbaras claim that there is a genuine issue of material fact as to whether “Colonial incurred expenses unreasonably and settled out of self-interest.” During oral argument before this court, however, counsel for the Barbaras acknowledged that there is no evidence in the record suggesting, as they had argued in the trial court, that Colonial settled the New York action to garner future business from Gotham. For that reason, the Barbaras have abandoned their claim as to that alleged improper motive and, instead, argue that “[a] fair and reasonable fact finder” could find “that it was unreasonable for Colonial to incur [almost \$1.5 million in expenses] without first testing [Gotham’s] claims through a motion to dismiss for failure to satisfy the [performance] bond’s conditions precedent” and “that Colonial settled the New York [action] solely to protect its own self-interest because it surrendered claims to Phoenix and then later took them back solely because [Gotham] told Colonial that it would not settle its performance bond claim without them.” Therefore, according to the Barbaras, Colonial’s self-interested settlement coupled with its unreasonable conduct in failing to move to dismiss the New York action was sufficient to create a genuine issue of material fact as to whether Colonial acted in bad faith in settling the New York action. We are not persuaded.¹⁹

Our Supreme Court’s decision in *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 267 Conn. 279, is instructive. In that case, a surety sought indemnification from a bond principal for payments the surety made to a claimant in accordance with a settlement agreement, pursuant to which the surety obtained a release of the claimant’s bad faith and Connecticut Unfair Trade Practices Act (CUTPA), General Statutes

§ 42-110a et seq., claims against it but did not obtain a release of the claims against the principal. *Id.*, 283, 287–88. The principal denied liability and asserted, both as a special defense and in its counter cross complaint against the surety, that the surety breached the implied covenant of good faith and fair dealing. *Id.*, 288. On the first day of the trial, the principal settled with the claimant, and the trial proceeded on the surety’s indemnification claim and the principal’s counter cross complaint. *Id.*

After trial, the jury returned a verdict for the principal on both matters, and the surety filed, inter alia, a motion for a directed verdict, claiming that the principal failed to prove its special defense and its counterclaim. *Id.*, 288, 296–97. “The trial court denied [the surety’s] motions, in part, because, on the basis of the evidence presented, the jury reasonably could have found that [the surety] had made payments to [the claimant] to settle [the claimant’s] bad faith and CUTPA claims rather than its claims against the payment bond.” *Id.*, 297.

On appeal, the surety claimed that the court improperly denied its motion for a directed verdict on its claim for indemnification. *Id.*, 296. Our Supreme Court concluded that “a surety’s failure to conduct an adequate investigation of a claim upon a payment bond, when accompanied by other evidence, reflecting an improper motive, properly *may* be considered as evidence of the surety’s bad faith.” (Emphasis in original.) *Id.*, 310. Similarly, the court concluded “that a self-interested settlement, when accompanied by other evidence of improper motive, can constitute bad faith.” *Id.*, 318. Ultimately, our Supreme Court held that the court properly denied the surety’s motion for a directed verdict on its indemnification claim because “the jury reasonably could have determined that [the surety] breached the implied covenant of good faith and fair dealing based upon all the evidence supporting [the principal’s] claims that [the surety], inconsistent with justified expectations and unfaithful to its duty under the implied covenant, both failed to investigate adequately *and* improperly settled [the claimant’s bad faith and CUTPA] claims solely out of self-interest.” (Emphasis in original.) *Id.*

In so holding, the court noted that “a surety is not acting in bad faith in seeking indemnification from a principal simply because the principal objected to and raised colorable defenses to payments made by the surety to the claimant. . . . This is true because, under an indemnity agreement, it is not essential that a principal be liable for the claims upon which the surety seeks to be indemnified.” (Citations omitted.) *Id.*, 313 n.15. Although the principal in *PSE Consulting, Inc.*, had raised defenses to the surety against the claimant’s recovery under the bond, our Supreme Court explained that its conclusion regarding bad faith in that case did

“not turn on that mere assertion, but involve[d] additional specific claims of bad faith and evidence in support thereof.” *Id.*

With regard to the principal’s claim as to the self-interested settlement, the court reasoned that the jury could have inferred an improper motive from evidence showing that the surety initially supported the principal’s defense against the claimant’s claim but changed course “only after [the claimant] had filed a complaint with the [I]nsurance [C]ommissioner and had threatened litigation against [the surety] based upon bad faith and CUTPA claims” *Id.*, 316. The court also highlighted the following evidence from which the jury reasonably could have concluded that the surety performed an inadequate investigation: (1) the surety failed to respond to the claimant’s claim within forty-five days and to identify those portions of the claim that were undisputed, as required by the payment bond; (2) the surety’s claims analyst never reviewed the principal’s project records and lacked the experience necessary to conduct an adequate assessment of the claimant’s claim; and (3) the surety waited almost two years before having an engineer evaluate the claim and provide a valuation of the work performed. *Id.*, 306–307. Accordingly, the court reasoned that “the self-interested settlement . . . was not cloaked in good faith garb, but, rather, was tainted by a confluence of circumstances from which a jury could properly have inferred improper motive.” *Id.*, 316. Finally, and of particular significance in the present case, our Supreme Court observed that “allowing potentially suspect claims to control or interfere with the contract obligations between a principal and its surety”; *id.*, 318; “is particularly problematic when the indemnity agreement . . . did not give the principal the option of posting collateral and determining for itself whether suspect claims should be litigated.” *Id.*, 318 n.17.

The circumstances involved in the present case are markedly different. The evidence in the record establishes that, after conducting an extensive investigation of the parties’ respective claims in the New York action, Colonial determined that it was prudent to settle Gotham’s claim against the performance bond by paying \$100,000 to Gotham, which was less than 3 percent of the \$3.5 million Gotham claimed as damages. Indeed, the Barbaras do not claim that Colonial’s investigation was inadequate; to the contrary, they contend that the investigation was excessive in light of Gotham’s alleged failure to satisfy conditions precedent to Colonial’s liability under the performance bond. Thus, the Barbaras’ claim of bad faith is based on Colonial over litigating the New York action, rather than filing what the Barbaras view as a dispositive motion to dismiss on which Colonial would have prevailed.

With regard to Colonial’s failure to file a motion to

dismiss in the New York action, the Barbaras contend that Gotham failed to satisfy certain conditions precedent in paragraph 3 of the performance bond.²⁰ According to the Barbaras, Phoenix's August 26, 2009 and October 18, 2010 letters to Gotham, in which Phoenix alleged that owner default had delayed Phoenix's work and in which Phoenix submitted change order requests for \$4.9 million, provided sufficient evidence to support "a preemptive motion to dismiss" for Gotham's failure to satisfy the "no-owner-default condition precedent." Next, they contend that, because Phoenix completed all the subcontract work more than one month before Gotham's September 7, 2010 letter terminating the subcontract, Gotham's purported termination of the subcontract was ineffective under New York's substantial performance rule, and, therefore, Gotham had not formally terminated Phoenix's right to complete the subcontract under subparagraph 3.2 of the performance bond. See, e.g., *845 UN Ltd. Partnership v. Flour City Architectural Metals, Inc.*, 28 App. Div. 3d 271, 272, 813 N.Y.S.2d 404 (2006) ("[t]he substantial performance rule precludes contract termination and limits a contracting party to a specific damage remedy"). Last, the Barbaras contend that Gotham failed to satisfy subparagraph 3.3 of the performance bond because it did not agree to pay the balance of the subcontract price to Colonial. As apparent support for their own assessment of the merits of these issues, the Barbaras note that Colonial had asserted Gotham's failure to satisfy these conditions in Colonial's affirmative defenses in the New York action.

Colonial responds that the merits of the defenses to Gotham's claim on the performance bond are irrelevant to Colonial's right to indemnification, as a surety does not necessarily act in bad faith when it settles a bond claim simply because the principal raised colorable defenses to the bond claim. See *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 267 Conn. 313 n.15. Nevertheless, Colonial also contends that the fact that the Barbaras "can only speculate that Colonial would have prevailed had it pursued a motion to dismiss" the New York action demonstrates "why Colonial not doing so cannot be a basis for bad faith." Colonial argues that the Barbaras "cannot satisfy their burden [to show bad faith] by pointing to a discretionary decision early in the [New York action], indisputably within Colonial's rights under the indemnity agreement, with which they disagree. [The Barbaras] had to present more than speculation in order to defeat summary judgment. They did not." (Footnote omitted.) We agree with Colonial.

Although the Barbaras insist that Colonial had ample evidence to move to dismiss the New York action based on Gotham's alleged owner default, Gotham disputed Phoenix's allegations, which is in accord with Colonial's position that filing a motion to dismiss on the basis of

alleged owner default was not advisable due to disputed factual issues. Similarly, although the Barbaras contend that Gotham was unable to terminate the subcontract under New York's substantial performance rule, as Phoenix had substantially performed the subcontract work, Colonial contends that, because the alleged default involved Phoenix's failure to pay costs associated with Phoenix's delay in performing and to pay Phoenix's sub-subcontractors, "[w]hether Gotham could lawfully declare Phoenix in default, and whether Phoenix had substantially performed its subcontract obligations, were factual issues" Finally, although the Barbaras maintain that it was undisputed that Gotham failed to pay the balance of the contract price to Colonial, Colonial contends that "[w]hether there was a 'balance of the contract price,' and what monies were owed to whom between Gotham and Phoenix, were, again, factual issues"

Given the existence of issues of fact surrounding the performance bond conditions, and in light of the Barbaras' admitted insolvency in their letter refusing Colonial's demand for collateral, the Barbaras have failed to demonstrate that Colonial's decision to settle the New York action, rather than moving to dismiss it, was an unreasonable exercise of the discretion Colonial is afforded under the indemnity agreement. See, e.g., *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 267 Conn. 317 (recognizing that indemnity agreements "make it possible for a surety to compensate unpaid subcontractors and vendors or to complete a project in response to a performance bond claim without having to await the adjudication of every possible defense by the principal"); see also *id.*, 313 n.15 ("a surety is not acting in bad faith in seeking indemnification from a principal simply because the principal objected to and raised colorable defenses to payments made by the surety"); *General Accident Ins. Co. of America v. Merritt-Meridian Construction Corp.*, 975 F. Supp. 511, 518 (S.D.N.Y. 1997) (surety did not settle bond claims in bad faith despite possible defenses asserted by principal). Further undermining the Barbaras' claim is the fact that they failed to present any evidence of a possible motivation that Colonial had to incur hundreds of thousands of dollars in unnecessary defense costs in the New York action if it thought a preemptive motion to dismiss would have been successful.

Likewise, with regard to Colonial's self-interested settlement, there is no evidence of an improper motive or a dishonest purpose. Unlike in *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 267 Conn. 311, Gotham did not raise bad faith or CUTPA claims against Colonial, and Colonial's settlement of the performance bond claims included a release of all claims brought against Phoenix in the New York action. See *id.* (evidence established that surety settled with claimant in

order to avoid bad faith counts against it and that “timing and circumstances” of settlement “was suspect”). Thus, Colonial’s settlement of the performance bond claim protected both itself and Phoenix from the possibility of a substantially larger judgment and further litigation costs. Compare *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 571 F.3d 1143, 1147 (11th Cir. 2009) (principal argued that surety paid claimant full amount of bond after performing unreasonable investigation of claim and “with the self-interested motive of releasing itself from [the claimant’s] bad faith claim”), with *Fidelity & Deposit Co. of Maryland v. C.E. Hall Construction, Inc.*, 627 Fed. Appx. 793, 796 (11th Cir. 2015) (affirming summary judgment for surety in which District Court rejected principals’ bad faith defense based on their defenses to underlying bond claims because surety’s “exercise of a contractual right, without more, cannot form the basis for bad faith”). Furthermore, unlike the principal in *PSE Consulting, Inc.*, the Barbaras had the option of posting collateral and instructing Colonial to defend the claims in the New York action but failed to do so. See *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 318 n.17 (significant factor in court’s analysis was that indemnity agreement did not allow principal to demand defense and post collateral).

In arguing that Colonial’s decision to release Phoenix’s affirmative claims to settle the New York action was evidence that Colonial settled solely out of self-interest, the Barbaras fail to recognize that self-interest is not itself evidence of an improper motive. As one court has observed, “it is doubtful that any surety would find it sensible to accept a contractual right to settle that did not include the authority to settle a subcontractor’s counterclaim. Without such authority, a surety’s right to settle would often be ineffective because a prime contractor would likely be unwilling to settle its claims against the surety without also settling any counterclaim the subcontractor has against the prime.” *Bell BCI Co. v. Old Dominion Demolition Corp.*, 294 F. Supp. 2d 807, 814 (E.D. Va. 2003) (*Bell*). Thus, although Colonial’s decision to exercise its rights under the indemnity agreement was motivated by self-interest, “it does not follow that the self-interested exercise of rights under a contract necessarily constitutes a per se violation of the implied covenant of good faith and fair dealing.” (Emphasis in original.) *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 267 Conn. 317. Indeed, there must be something more than a self-interested settlement, but the “other evidence of improper motive” presented in *PSE Consulting, Inc.*, is absent in the present case. See *id.*, 318; see also *Engbrock v. Federal Ins. Co.*, 370 F.2d 784, 787 (5th Cir. 1967) (“improper motive . . . is an essential element of bad faith”).

In sum, the Barbaras introduced no evidence to sup-

port their allegations that Colonial acted with an improper motive or dishonest purpose in the New York action. The Barbaras presented no evidence that Colonial's decision to settle the New York action, rather than attempting to have it dismissed, was made in bad faith. Accordingly, the court properly rendered summary judgment for Colonial on its indemnification claim.²¹ See, e.g., *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 721 (5th Cir. 1995) (affirming summary judgment for surety because there was no factual support for principal's bad faith defense).

II

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In its appeal from the judgment in the Barbaras' action, Colonial claims that the trial court improperly determined that the Barbaras' claims are not precluded by the doctrines of res judicata and collateral estoppel. We are not persuaded.

The following additional facts regarding the New York action are relevant to Colonial's claim. In their memorandum in opposition to Colonial's motion to enforce the settlement, Phoenix claimed that New York law recognizes a principal's bad faith defense to a surety's indemnification claim and argued that, "since Colonial can only recover the settlement amount from Phoenix if it was made in good faith and was reasonable, it follows that Colonial may not make a settlement unless it is in good faith and reasonable. Since Colonial would have won a motion to dismiss [the New York action], it was unreasonable and in bad faith to settle the action paying [Gotham] monies and discontinuing Phoenix's affirmative claims and such settlement should not be permitted." In addition, Phoenix submitted an "affirmation in opposition" signed by Lina Barbara and an "affidavit in opposition" signed by James Barbara, in which the Barbaras averred that Colonial breached the indemnity agreement by engaging in protracted and costly discovery rather than moving to dismiss the New York action.

In its memorandum of law in response to Phoenix's opposition, Colonial argued that the assignment and attorney-in-fact provisions in the indemnity agreement "expressly authorize settlements of the exact nature of the settlement agreement, in which Colonial exercises the discretion granted to it by Phoenix and the [Barbaras] to fully and finally resolve bond claims for itself and as assignee and attorney-in-fact for Phoenix. . . . Furthermore, as assignee of all rights in connection with the subcontract, Colonial is entitled to settle and release all of these assigned claims asserted by Phoenix. . . . [B]ecause [Phoenix] assigned all its rights in connection with the subcontract to Colonial, Phoenix is no longer the real party in interest with regard to such claims. It is Colonial, not Phoenix, who owns the affir-

mative claims asserted by Phoenix in [the New York action], and . . . Phoenix has no right to prosecute such claims and compel further litigation [in the New York action]. . . . Phoenix will not suffer prejudice from discontinuance of this lawsuit because only Colonial, as the real party in interest with respect to such claims, has the right to pursue recovery thereon.” (Citations omitted; emphasis omitted; footnotes omitted.)

In its oral decision granting Colonial’s motion to enforce the settlement, the New York court explained: “Gotham . . . filed this action to recover payment for costs incurred as a result of the untimely performance of the window wall work by Phoenix. Gotham . . . sued Phoenix for breach of the subcontract and sued Colonial for breach of its obligations under the performance bond. . . . Colonial now brings a motion to enforce [the] settlement agreement Colonial negotiated the settlement as the attorney-in-fact for Phoenix.

* * *

“Here, it is undisputed by the parties that Phoenix failed to deposit with Colonial cash or collateral sufficient to cover [Gotham’s] claim in [the New York] action. Therefore, under paragraph 10 (V) [of the indemnity agreement] . . . Colonial had the sole and exclusive right to settle the instant claims against Phoenix. Phoenix objects to the settlement agreement on the grounds that it purportedly had meritorious defenses against Gotham . . . that were not pursued to Phoenix’s liking by Colonial. However, the language [in the] indemnity agreement moots this objection [because], by not posting cash or collateral, Colonial gained the sole and exclusive right to pay or defend the claims against Phoenix in [the New York action]. Moreover, consistent with the agreement, Colonial was authorized to enter into the settlement agreement on Phoenix’s behalf as its attorney-in-fact. Therefore, Colonial’s ability to negotiate and execute the . . . settlement agreement is clear. By resolving this dispute between the parties, the court can give effect to the settling parties’ intent to resolve this matter in its entirety. . . . Based on my review of the papers, I found nothing objectionable with the settlement agreement. Therefore, the court will sign it and will also dismiss this case with prejudice.

“Of course, by not answering, Phoenix is put in the position that, should there be a desire on the part of Colonial to go against Phoenix for the \$100,000 it’s about to pay, that is between [Phoenix] and Colonial” On August 20, 2015, the court issued a written order consistent with its oral decision.

The Barbaras filed their operative revised complaint against Colonial on November 20, 2018. In the four count complaint, they allege that Colonial breached

(1) paragraph 4 (B) of the indemnity agreement by incurring expenses in bad faith, (2) the implied covenant of good faith and fair dealing under the indemnity agreement in its handling of the New York action, and (3) the performance bond by failing to move to dismiss the New York action on the basis of Gotham's failure to satisfy conditions precedent to Colonial's liability. In the fourth count, the Barbaras sought a declaratory judgment that "Colonial's bad faith behavior and continuous breaches of the [indemnity agreement] were of such magnitude that the [indemnity agreement] should be declared void."

In denying Colonial's motion for summary judgment in the Barbaras' action, the court reasoned that, although Colonial submitted extensive evidence regarding the New York action, there was no "evidence of any claim(s) asserted by Phoenix against Colonial in the [New York action]. The 'claims' that [Colonial] argues [the Barbaras are] precluded from bringing in the [Barbaras'] action were arguments raised by Phoenix in opposition to [Colonial's] motion [to enforce] the settlement . . . in the [New York action]. . . . Res judicata, therefore, does not apply in the [Barbaras'] action.

"As to the applicability of collateral estoppel, this court has already determined in the consolidated action that the issue of whether [Colonial's] determination of the necessity and advisability of expenses that it incurred in connection with the Gotham bonds was made in bad faith and, thus, in breach of section 4 (B) of the indemnity agreement was not necessarily determined by the court in the [New York action] for its judgment finding the settlement agreement enforceable. . . . For the same reasons, collateral estoppel does not preclude the determination of the issue as to [Colonial's] alleged bad faith under the indemnity agreement in the [Barbaras'] action. Similarly, the issue of whether [Colonial] breached the performance bond was not actually or necessarily determined by the court in the [New York action]." (Citations omitted; footnotes omitted.)

Colonial first claims that the court improperly concluded that the Barbaras' action is not precluded by the doctrine of res judicata. We disagree.

The following legal principles are relevant to our analysis. "[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to *any other admissible matter which might have been offered for that purpose*. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or differ-

ent evidence or legal theories might be advanced in support of it. . . . In order 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.” (Emphasis in original; internal quotation marks omitted.) *Girolametti v. Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019).

“Res judicata, as a judicial doctrine . . . should be applied as necessary to promote its underlying purposes. These purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being [harassed] by vexatious litigation. . . . But by the same token, the internal needs of the judicial system do not outweigh its essential function in providing litigants a legal forum to redress their grievances. Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. . . . The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. The doctrines of preclusion, however, should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies. . . .

“We review the doctrine of res judicata to emphasize that its purposes must inform the decision to foreclose future litigation. The conservation of judicial resources is of paramount importance as our trial dockets are deluged with new cases daily. We further emphasize that where a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding. But the scope of matters precluded necessarily depends on what has occurred in the former adjudication.” (Internal quotation marks omitted.) *Bruno v. Geller*, 136 Conn. App. 707, 722–23, 46 A.3d 974, cert. denied, 306 Conn. 905, 52 A.3d 732 (2012).

On appeal, Colonial argues that the four elements necessary for application of res judicata are met and that the doctrine’s underlying policies require its application in the present case. Specifically, Colonial argues that (1) the judgment in the New York action granting its motion to enforce the settlement was rendered on

the merits by a court of competent jurisdiction, (2) the Barbaras are in privity with Phoenix, (3) Phoenix had an adequate opportunity to litigate its claims when it opposed the settlement agreement, and (4) the Barbaras allege the same cause of action in the present case as Phoenix asserted in opposing the settlement agreement. In response, the Barbaras do not dispute that they are in privity with Phoenix and that the same underlying claims are at issue. Instead, they argue that the judgment granting Colonial's motion to enforce the settlement was not on the merits of their claims²² and that the New York action did not afford them an adequate opportunity to litigate those claims. We conclude that res judicata does not apply in the present case because the proceedings in the New York action did not provide the proper forum for the Barbaras to adequately litigate their bad faith claims.²³

As to whether Phoenix had an adequate opportunity to litigate their bad faith claims in the context of Colonial's motion to enforce the settlement in the New York action, we note that, "although parties are not *required* to resolve all disputes during a . . . proceeding, when a party had the opportunity to raise the claim and the . . . *proceeding provided the proper forum for the resolution of that claim*, res judicata may bar litigation of a subsequent action." (Emphasis altered.) *Weiss v. Weiss*, 297 Conn. 446, 464, 998 A.2d 766 (2010).

Colonial argues that its motion to enforce the settlement "was a fully contested matter, in which Phoenix and [the Barbaras] directly and fully participated, and which resulted in the [New York] judgment. Phoenix could have, but consciously decided not to appeal [from that] judgment. . . . As Phoenix and [the Barbaras] *did* fully litigate Phoenix's claims in opposition to the motion [to enforce the settlement], they necessarily had an adequate *opportunity* to do so." (Citation omitted; emphasis in original.) Although the Barbaras acknowledge that their claims in the present case were asserted in the New York action in opposition to Colonial's motion to enforce the settlement, they argue that "the limited scope of the [New York Civil Practice Law and Rules 2104 (CPLR 2104)]²⁴ motion [to enforce the settlement] did not afford [them] an adequate opportunity to litigate their claims that Colonial damaged them by acting in bad faith and otherwise mishandling the New York litigation in breach of the indemnity agreement and performance bond. As shown, and as the New York court determined by finding them moot, those matters are beyond the office [of] a CPLR 2104 proceeding." (Footnote added.) We agree with the Barbaras.

The crux of the parties' disagreement is whether the New York action was the proper forum in which the Barbaras could assert their bad faith and breach of contract claims. Although there are no Connecticut cases directly on point, *Safeco Ins. Co. of America v.*

Hirani/MES, JV, 480 Fed. Appx. 606 (2d Cir. 2012) (*Safeco*), is instructive. In that case, two bond principals appealed from the orders of the United States District Court for the Eastern District of New York granting the surety's motion for partial summary judgment and ordering the principals to provide the surety with sufficient collateral security to cover expected costs and expenses pursuant to the indemnity agreements executed by the parties. *Id.*, 607–608.

The District Court relied on *Bell BCI Co. v. Old Dominion Demolition Corp.*, supra, 294 F. Supp. 2d 807. See *Safeco Ins. Co. of America v. M.E.S., Inc.*, Docket No. 09-CV-3312 (ARR) (ALC), 2010 WL 5437208, *14 (E.D.N.Y. December 17, 2010). In *Bell*, a surety settled its principal's counterclaim against a bond obligee as part of its settlement of the obligee's claims against performance bonds. *Bell BCI Co. v. Old Dominion Demolition Corp.*, supra, 810–11. The surety moved to enforce the settlement agreement with the obligee and to dismiss the principal's counterclaim. *Id.*, 811. The United States District Court for the Eastern District of Virginia rejected the principal's argument "that the settlement agreement should not be enforced because the [s]urety did not settle its counterclaim in good faith." *Id.*, 814. The court reasoned that "this is not the proper forum for [the principal] to make its 'bad faith' argument. . . . [E]ven assuming arguendo that [the principal's] bad faith argument is valid, such an argument is properly asserted as a defense to the [s]urety's claim against [the principal] for indemnification. It appears that the [s]urety has filed just such a suit in Alexandria Circuit Court. . . . Therefore, [the principal] may properly assert the bad faith defense there and, should it prevail, [the principal] may avoid paying \$275,000 indemnity to the [s]urety. Indeed, [the principal] in that suit may be able to recover from the [s]urety the value of its counterclaim if it establishes not only the [s]urety's bad faith in settling the counterclaim, but also the merits of the counterclaim."²⁵ (Citation omitted.) *Id.*, 815.

In *Safeco Ins. Co. of America v. Hirani/MES, JV*, supra, 480 Fed. Appx. 608, the principals appealed, claiming "that summary judgment was improper because the District Court failed to consider certain equitable defenses, most of which relate[d] to allegations that [the surety] acted in bad faith." In affirming the judgment, the United States Court of Appeals for the Second Circuit, applying New York law, reasoned that, under the indemnity agreements, the "[principals] agreed to give [the surety] enough collateral security to 'discharge any claim made against [the surety]' and to 'cover all exposure under . . . [the] bonds.' [The principals did] not challenge the validity of the agreements or the substance of the collateral security provisions. Nor d[id] they dispute that they were declared to be in default on the contracts covered by [the surety's]

bonds and that, as a result, [the surety] was exposed to liability and began incurring expenses under the bonds. Under the plain, unambiguous language of the contracts, [the principals] were required to provide collateral security upon demand . . . and, therefore, [the surety] was entitled to partial summary judgment as to its right to collateral security.” Id.

In rejecting the principals’ argument as to the relevancy of their bad faith defense, the court explained that the “principals conflate collateral security with an award of indemnification. . . . The District Court was entitled to award [the surety] specific performance on its contractual right to collateral security and ignore the defenses related to [the surety’s] separate right to indemnification, as to which issues of bad faith may be relevant. . . . [Furthermore], the provisions of the contract that [the principals] contend required [the surety] to act in good faith are unrelated to the provisions obligating them to provide [the surety] with collateral security.” Id., 608–609. Accordingly, the court held that, “[b]ecause [the principals’] allegations of bad faith do not implicate [the surety’s] right to the interim remedy of collateral security, the District Court did not err in granting partial summary judgment.” Id., 609.

The United States Court of Appeals for the Sixth Circuit considered the import of *Safeco* and *Bell* in *Great American Ins. Co. v. E.L. Bailey & Co., Inc.*, 841 F.3d 439, 444 (6th Cir. 2016), explaining that, “[i]n both *Bell* and *Safeco*, the alleged bad faith of particular settlements was irrelevant to determining whether the surety agreements authorized the sureties to settle, and therefore those courts held off adjudication of bad faith until the sureties brought indemnification claims to recover the settlement payments. This procedure makes sense in most cases challenging surety settlements, where the disputed settlement requires the surety to *make* a payment on the principal’s behalf, for which the surety then seeks indemnification. The principal can argue bad faith as an affirmative defense in the follow-up indemnity action.” (Emphasis in original.) Therefore, the court concluded, “whether a principal can raise bad faith should depend on fairness: if there is not another, more appropriate forum where the principal can raise the issue, then the court should consider it in a declaratory judgment action. Adjudicating bad faith is especially appropriate . . . where the declaratory judgment claim is already joined with an indemnification claim against the same principal, because payments might well offset one another.” Id., 445.

In the present case, Colonial’s motion to enforce the settlement in the New York action is akin to the declaratory judgment action in *Safeco*, as Colonial sought to confirm its rights under the indemnity agreement to settle Phoenix’s affirmative claims pursuant to the assignment and attorney-in-fact provisions of the

indemnity agreement. In granting the motion, the New York court stated that “the language [in the] indemnity agreement moots [Phoenix’s] objection because], by not posting cash or collateral, Colonial gained the sole and exclusive right to pay or defend the claims against Phoenix in [the New York action]. Moreover, consistent with the agreement, Colonial was authorized to enter into the settlement agreement on Phoenix’s behalf as its attorney-in-fact. Therefore, Colonial’s ability to negotiate and execute the . . . settlement agreement is clear. . . . Of course, by not answering, Phoenix is put in the position that, should there be a desire on the part of Colonial to go against Phoenix for the \$100,000 it’s about to pay, that is between [Phoenix] and Colonial” That reasoning is consistent with the Second Circuit’s holding in *Safeco*, as it is clear that the New York court “ignore[d] the defenses related to [Colonial’s] separate right to indemnification, as to which issues of bad faith may be relevant.” *Safeco Ins. Co. of America v. Hirani/MES, JV*, supra, 480 Fed. Appx. 608. Thus, whether Colonial acted in good faith in settling the New York action was irrelevant to the New York court’s determination as to whether Colonial had the authority to do so. Moreover, because Colonial’s indemnity action remained pending in Connecticut when Colonial sought to enforce the settlement agreement in the New York action, there is no question that there was “another, more appropriate forum” in which Phoenix could raise its claims related to Colonial’s right to indemnification. *Great American Ins. Co. v. E.L. Bailey & Co., Inc.*, supra, 841 F.3d 445. Accordingly, we conclude that the proceedings on Colonial’s motion to enforce the settlement in the New York action did not provide a proper forum for Phoenix’s bad faith claims.

In sum, because the proceedings on Colonial’s motion to enforce the settlement in the New York action did not provide a proper forum in which Phoenix could raise its bad faith and breach of contract claims concerning Colonial’s right to indemnification, we conclude that the Barbaras did not have an adequate opportunity to litigate their claims against Colonial.²⁶ Accordingly, the trial court properly determined that *res judicata* did not apply to the Barbaras’ claims.

Our conclusion as to the application of *res judicata* also disposes of Colonial’s claim that collateral estoppel precludes the Barbaras’ claims in the present case. “For collateral estoppel to apply, the issue concerning which relitigation is sought to be estopped must be identical to the issue decided in the prior proceeding. . . . Further, [t]he [party seeking estoppel] has the burden of showing that the issue whose relitigation he seeks to foreclose was *actually decided* in the first proceeding.” (Citation omitted; emphasis added; internal quotation marks omitted.) *Windsor Locks Associates v. Planning & Zoning Commission*, 90 Conn. App. 242, 252, 876 A.2d 614 (2005). Given that we conclude that the

Barbaras did not have an adequate opportunity to litigate their bad faith claims in the New York action, it necessarily follows that the issues were not actually decided in that proceeding.

The judgments are affirmed.

In this opinion the other judges concurred.

¹ The parties are transposed as plaintiffs and defendants in the two underlying cases. For the sake of clarity, we refer to the parties by name rather than as plaintiff or defendant.

² In light of the grounds raised in Colonial's motion for summary judgment, we consider the denial of the motion for summary judgment to be an appealable final judgment. "Because one purpose of the doctrines of res judicata and collateral estoppel is to avoid unnecessary and duplicative litigation, we treat the denial of a motion for summary judgment based on the doctrines of collateral estoppel or res judicata as a final judgment for appeal purposes." *Girolametti v. Michael Horton Associates, Inc.*, 173 Conn. App. 630, 648, 164 A.3d 731 (2017), *aff'd*, 332 Conn. 67, 208 A.3d 1223 (2019).

³ Phoenix was defaulted for failing to appear in the indemnity action and is not participating in the Barbaras' appeal.

⁴ Lina Barbara signed the indemnity agreement on behalf of Phoenix as its president and as the individual indemnitor, and James Barbara signed as spouse indemnitor.

⁵ "Under a performance bond, the surety is liable for a default in performance by the principal of its contract obligations [The performance bond] provides available funds to complete the principal's contract should the latter be in default of the performance it owes the obligee. . . . In contrast, a payment bond is intended to [protect] subcontractors, suppliers, and those providing labor to a principal under a contract of construction and assures that a financially responsible party, the surety, is committed to paying these . . . claimants should the principal fail to do so." (Citation omitted; internal quotation marks omitted.) *U.S. Fidelity & Guaranty Co. v. Arch Ins. Co.*, 578 F.3d 45, 48 n.2 (1st Cir. 2009).

⁶ The indemnity agreement provides in relevant part: "Indemnitor and your successors agree to perform all the conditions of each Bond and Contract and to indemnify and save harmless Surety from and against any and all (i) demands, liabilities, losses, costs, damages or expenses of whatever nature or kind, including all fees of attorneys and all other expenses, including but not limited to costs and fees of investigation, adjustment of claims, procuring or attempting to procure the discharge of Bonds, enforcement of any Contract with Indemnitor, and in attempting to recover losses or expenses from Indemnitor, or third parties, whether or not Surety shall have paid out any or all of such sums, (ii) amounts sufficient to discharge any claim made against Surety on any Bond, which amounts may be used by Surety to pay such claim, or may be held by Surety as collateral security against any loss on any Bond, and (iii) any premiums due on Bonds issued by the Surety on behalf of the Principal (hereinafter the 'Indemnity'). . . .

"In furtherance of the Indemnity hereunder . . . Surety shall have the right in its sole discretion to determine whether any claims shall be paid, compromised, defended, prosecuted or appealed. . . . Surety shall have the right to incur such expenses in handling a claim as it deems necessary or advisable . . . and Surety's good faith determination as to the necessity or advisability of any such expense shall be final and conclusive upon Indemnitor. . . . Surety shall have the foregoing rights, irrespective of the fact that Indemnitor may have assumed, or offered to assume, the defense of Surety upon such claim. . . . In any claim or suit hereunder, an itemized statement of the aforesaid loss and expense, sworn to by an officer of Surety, or the vouchers or other evidence of disbursement by Surety, shall be prima facie evidence of the fact and extent of the liability hereunder of Indemnitor. . . . Surety shall have the right to reimbursement of its expenses, premiums and attorneys' fees hereunder, irrespective of whether any Bond loss payment has been made by Surety. Surety may recover from Indemnitor its expenses and attorneys' fees incurred in prosecuting or defending any action arising out of or relating to this Agreement or other Contract with Indemnitor. Indemnitor's duty to reimburse the Company for fees and expenses that it incurs shall arise upon the receipt of any claim by Colonial. . . .

"Indemnitor shall be in Default with respect to a Contract if any of the following occur Any beneficiary of a Bond or obligee of a Contract declares Principal to be in default. . . . Principal or any Indemnitor

breaches any provision of this Agreement or Contract with Surety. . . .

“In the event of Default . . . Surety may at its option and sole discretion . . . file an immediate suit to enforce any or all of the provisions of this Agreement. . . .

“As security for the performance of all of the provisions of this Agreement each Indemnitor hereby . . . assigns, transfers, pledges and conveys to Surety any and all claims of such Indemnitor against, or any sums due and owing to such Indemnitor by, the Principal and (effective as of the date of each Bond) all rights in connection with any Contract, including but not limited to . . . all subcontracts made in connection with a Contract and such subcontractors Surety bonds . . . [and] all accounts receivable, including any and all sums due or which may thereafter become due under a Contract and all sums due or to become due on all other contracts, bonded or unbonded, in which any Indemnitor has an interest

“The [Indemnitor] hereby irrevocably nominate[s], constitute[s], appoint[s] and designate[s] the Company or its designee as their attorney-in-fact with the right but not the obligation, to exercise all of the rights assigned, transferred and set over to Surety by the [Indemnitor] in this Agreement The [Indemnitor] hereby ratifies and affirms all acts and actions taken and done by the Surety or its designee as attorney-in-fact. This power of attorney is irrevocable and is coupled with an Interest and shall survive the subsequent disability or legal incapacity of any [Indemnitor]. . . .” (Emphasis omitted.)

⁷ In the indemnity action, Colonial filed an application for a prejudgment remedy against Phoenix and the Barbaras, which the court, *Hon. William L. Hadden, Jr.*, judge trial referee, granted on April 17, 2012, in the amount of \$90,000. On August 7, 2012, Colonial moved to modify the prejudgment remedy to reflect the additional costs and expenses it had incurred. The court granted the motion, increasing the amount of the prejudgment remedy to \$360,291.08.

⁸ The stipulation was signed by Lina Barbara, as Phoenix’s attorney.

⁹ In October, 2013, the Barbaras asserted the following special defenses in the indemnity action: Colonial demanded payment under the Gotham bonds for costs incurred prior to the lawsuit being commenced; Colonial failed to mitigate its damages because it had not moved to dismiss the New York action; the indemnification was premature because all of the damages had not occurred at the time Colonial brought the action; and Colonial’s demand for collateral was unreasonable because Colonial was unlikely to lose in the New York action. Colonial moved to strike those special defenses on October 25, 2013.

In November, 2013, the Barbaras amended their answer and asserted the following amended special defenses: Colonial “breached the implied covenant of good faith”; Colonial failed to mitigate its damages because it had not moved to dismiss the New York action; the indemnity action was premature because all of the damages had not occurred at the time Colonial brought the action; and Colonial’s demand for collateral was unreasonable because Colonial was unlikely to lose in the New York action. Colonial filed a motion to strike the amended special defenses on December 3, 2013.

On March 31, 2014, the court, *B. Fischer, J.*, granted Colonial’s October 25, 2013 motion to strike the Barbaras’ special defenses. On December 2, 2014, the court granted Colonial’s December 3, 2013 motion to strike.

¹⁰ On April 2, 2014, Colonial filed a certificate of closed pleadings and a claim for the trial list.

¹¹ On January 11, 2017, the Barbaras filed a joint appeal challenging the court’s orders denying their request for leave and sustaining Colonial’s objection thereto. On March 22, 2017, this court granted Colonial’s motion to dismiss that appeal for lack of a final judgment.

¹² Specifically, Colonial submitted the following evidence: an affidavit by Attorney Steven Lapp, excerpts from the Barbaras’ complaint against Colonial, an affidavit by Nunziata, and the indemnity agreement (Exhibit 1); the Gotham bonds (Exhibit 2); the subcontract (Exhibit 3); four letters from Gotham to Phoenix (Exhibits 4, 5, 6 and 8); United Iron’s notice of claim to Colonial (Exhibit 7); a letter from Gotham to Colonial (Exhibit 9); the amended complaint in the United Iron action (Exhibit 10); the stipulation of discontinuance of the United Iron action (Exhibit 11); the amended complaint in the New York action (Exhibit 12); Colonial’s amended answer and affirmative defenses to Gotham’s amended complaint in the New York action (Exhibit 13); Phoenix’s answer to Gotham’s amended complaint with counterclaims against Gotham (Exhibit 14); Phoenix’s third-party summons and third-party complaint against Travelers (Exhibit 15); Phoenix’s first amended

second third-party complaint against Gotham Construction and Sochin (Exhibit 16); a letter with attachments from Colonial to Phoenix and the Barbaras (Exhibit 17); a letter from the Barbaras to Colonial (Exhibit 18); a letter from Colonial to Phoenix and the Barbaras (Exhibit 19); Gotham's responses to Phoenix's amended first demand for interrogatories in the New York action (Exhibit 20); the settlement agreement in the New York action (Exhibit 21); Phoenix's memorandum of law in opposition to Colonial's motion to enforce the settlement (Exhibit 22); the Barbaras' affirmation and affidavit in opposition to Colonial's motion to enforce the settlement (Exhibits 23 and 24); Colonial's reply memorandum in response to Phoenix's opposition to the motion to enforce the settlement (Exhibit 25); a supplemental affidavit by Nunziata in support of Colonial's motion to enforce the settlement (Exhibit 26); the transcript of the July 28, 2015 hearing in the New York action (Exhibit 27); the August 20, 2015 court order issued in the New York action (Exhibit 28); and the notice of entry of the August 20, 2015 court order (Exhibit 29).

¹³ “[T]he prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction. . . . The policy behind the doctrine is to prevent unnecessary litigation that places a burden on crowded court dockets.” (Citations omitted; internal quotation marks omitted.) *Kleinman v. Chapnick*, 140 Conn. App. 500, 505, 59 A.3d 373 (2013).

¹⁴ The court reasoned that “the basis for [the Barbaras’] bad faith claims against [Colonial] did [not] arise until after [Colonial] entered into the settlement with Gotham, releasing Phoenix’s affirmative claims against Gotham and paying Gotham \$100,000 for which the [Barbaras] must indemnify [Colonial] pursuant to the [indemnity] agreement. . . . [T]he prior pending action doctrine is a rule of justice and equity to avoid circumstances where duplicative litigation is oppressive and vexatious and to prevent unnecessary litigation that places a burden on our state’s already crowded court dockets. . . . The application of the prior pending action doctrine in the manner asserted by [Colonial] here cannot be viewed as being consistent with any notion of justice and equity, particularly under the circumstances where adjudication of the [Barbaras’] claims can only be assured by the prosecution of the present action in light of the timing of [Colonial’s] institution of the indemnity [action] vis-à-vis when its alleged wrongful acts occurred.” (Citation omitted; internal quotation marks omitted.)

¹⁵ The Barbaras submitted the following evidence: excerpts of the subcontract between Phoenix and Gotham (Exhibit A); the indemnity agreement (Exhibit B); a photograph of the embeds in the concrete at the hotel project and emails relating to the embeds (Exhibit C); the Gotham bonds (Exhibit D); excerpts of the hotel project’s Guaranteed Maximum Price Submission (Exhibit E); specifications for the hotel project and an email from Gotham to Phoenix (Exhibit F); documents relating to Phoenix’s request to Gotham for revision of the hat channel (Exhibit G); additional specifications for the hotel project and surveys by Gotham’s surveyor (Exhibit H); a letter from Colonial to Gotham (Exhibit I); a letter from Phoenix to Gotham with attachments (Exhibit J); Gotham’s notices to Phoenix regarding termination of the subcontract (Exhibit K); Colonial’s answer in the New York action (Exhibit L); New York case law (Exhibit M); invoices from Beacon Consulting Group, Inc. (Beacon Consulting), to Colonial (Exhibit N); emails between Beacon Consulting and Phoenix (Exhibit O); Gotham’s responses to Phoenix’s demand for interrogatories in the New York action (Exhibit P); Colonial’s amended answer and affirmative defenses to Gotham’s amended complaint in the New York action (Exhibit Q); and a letter from Gotham to Sochin and an email from Gotham Construction to its general counsel (Exhibit R).

¹⁶ Nunziata’s affidavit included the following exhibits: the indemnity agreement (Exhibit 1); the Gotham bonds (Exhibit 2); the subcontract (Exhibit 3); a September 20, 2010 letter from Gotham to Phoenix (Exhibit 4); Gotham’s summons and complaint in the New York action (Exhibit 5); letters from Colonial to Phoenix and the Barbaras (Exhibits 6 and 7); Gotham’s responses to Phoenix’s interrogatories in the New York action (Exhibit 8); the settlement agreement (Exhibit 9); the transcript of the July 28, 2015 court proceed-

ing in the New York action (Exhibit 10); and a copy of the court's judgment in the New York action (Exhibit 11).

Lapp's affidavit included the following exhibits: excerpts from Lina Barbara's response to Colonial's first set of interrogatories and requests for production in the Barbaras' action (Exhibit 1); Gotham's summons and complaint in the New York action (Exhibit 2); Colonial's proposed order to show cause filed in the New York action (Exhibit 3); the proposed order granting the motion to enforce the settlement (Exhibit 4); Colonial's memorandum of law in support of its motion to enforce the settlement (Exhibit 5); Nunziata's affidavit in support of Colonial's motion to enforce the settlement (Exhibit 6); the exhibits that were attached to Nunziata's affidavit in support of the motion to enforce the settlement (Exhibits 7 through 19); the order to show cause issued by the court in the New York action (Exhibit 20); Phoenix's memorandum of law in opposition to Colonial's motion to enforce the settlement (Exhibit 21); the Barbaras' affirmation and affidavit in opposition to the motion to enforce the settlement (Exhibits 22 and 23); exhibits A through R to the Barbaras' oppositions to the motion to enforce the settlement (Exhibit 24); the affirmation of service by Lina Barbara in the New York action (Exhibit 25); Colonial's memorandum of law in response to Phoenix's opposition to the motion to enforce the settlement (Exhibit 26); Nunziata's supplemental affidavit in support of Colonial's motion to enforce the settlement with selected exhibits (Exhibit 27); an affidavit by Attorney Frederick R. Rohn with exhibit A to Rohn's affidavit filed on behalf of Gotham, Gotham Construction, and Travelers in the New York action (Exhibit 28); Christopher Jaskiewicz' reply affidavit with exhibits A through I filed on behalf of Gotham, Gotham Construction, and Travelers in the New York action (Exhibit 29); the transcript of the July 28, 2015 New York court proceeding (Exhibit 30); the court's judgment in the New York action (Exhibit 31); and the notice of judgment in the New York action (Exhibit 32).

¹⁷ The court reasoned that “[r]es judicata does not apply to the [Barbaras'] claims in the present matter because [u]nder the doctrine of res judicata, a final judgment, when rendered on the merits, is an absolute bar to a *subsequent action* . . . between the same parties or those in privity with them, upon the same claim. . . . This matter does not involve a subsequent action brought by the [Barbaras].” (Citation omitted; emphasis in original; internal quotation marks omitted.) The court also determined that collateral estoppel did not apply, reasoning that, although the Barbaras were in privity with Phoenix, the issue regarding Colonial's good faith “was not in fact determined or necessarily determined in the [New York action] because whether Colonial made good faith determinations as to the necessity and advisability of expenses incurred in connection with claims arising from the Gotham bonds was not essential to the court's decision whether to approve the settlement agreement. The statements of the [New York court] on the record, during the July 28, 2015 court proceeding and the August 20, 2015 order, do not address this issue. . . .

“[The court] approved the settlement agreement because ‘it [was] undisputed by the parties that Phoenix failed to deposit with Colonial cash or collateral sufficient to cover [Gotham's] claims . . . [and] [t]herefore, under paragraph 10 (V) [of the indemnity agreement] . . . Colonial had the sole and exclusive right to settle the instant claims against Phoenix.’ The court also recognized Colonial's ‘ability to execute and negotiate’ the settlement agreement on Phoenix's behalf as its attorney-in-fact under the indemnity agreement. Similarly, the court's August 20, 2015 order stated: ‘[Colonial] is authorized and empowered to settle the [New York action], including counterclaims made by [Phoenix], as third-party plaintiff, against [Travelers, Gotham Construction, and Sochin], as third-party defendants, in full settlement of all such claims and defenses made in the [New York action]’

“The [New York action], therefore, did not address the broader issue of whether Colonial's determination of the necessity and advisability of expenses that it incurred in connection with the Gotham bonds, under the indemnity agreement, lacked good faith. Collateral estoppel, therefore, does not preclude the [Barbaras] from asserting bad faith against Colonial in the [Barbaras'] action.”

¹⁸ “Right-to-settle clauses . . . generally are enforced according to their terms. In other words, in the face of such a provision, a surety typically has wide discretion in settling claims made upon a bond, even where the principal is not liable for the underlying claim. . . . The surety's discretion to make settlement payments is not unfettered, however, and most jurisdictions have held that the surety is entitled to indemnification only for payments that were made in good faith. . . .

“The purpose of [prima facie evidence] clauses . . . is to facilitate the handling of settlements by sureties and obviate unnecessary and costly litigation.” (Citations omitted; internal quotation marks omitted.) *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, supra, 267 Conn. 292–93.

¹⁹ Colonial argues that the Barbaras’ claim that Colonial settled the New York action “solely to protect its own self-interest because it surrendered claims to Phoenix and then later took them back” is unpreserved and, therefore, unreviewable. (Internal quotation marks omitted.) The Barbaras respond that “this court properly can review [their] argument because it is an *argument*, not a *claim*.” (Emphasis in original; internal quotation marks omitted.) We need not decide whether the Barbaras’ claim is properly characterized as a claim or argument because we conclude that they cannot prevail on the merits of it. See *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) (review of unpreserved claim is appropriate when party who raised claim cannot prevail “because it cannot prejudice the opposing party”).

²⁰ Paragraph 3 of the performance bond provides: “If there is no Owner Default, the Surety’s obligation under this Bond shall arise after: 3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner’s right, if any, subsequently to declare a Contractor Default; and 3.2 The Owner has declared a Contractor Default and formally terminated the Contractor’s right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagaraph 3.1; and 3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.”

²¹ In light of our conclusion, we do not address Colonial’s alternative grounds for affirming the judgment based on the application of the doctrines of res judicata and collateral estoppel.

²² The Barbaras claim that “the New York court found that the indemnity agreement mooted Phoenix’s objection to the settlement” and argue that “it is well settled in New York that a trial court’s disposition of a claim on mootness grounds is not a disposition on the merits” According to the Barbaras, “there can be no dispute that . . . the New York [court’s] decision finding Phoenix’s objections moot was not a decision on the merits of the Barbaras’ claims of bad faith and litigation mishandling and, therefore, is not res judicata of any claim that they assert in this action.”

We are not persuaded by the Barbaras’ assertion that the New York court determined that Phoenix’s objections were moot in the jurisdictional sense. It is apparent from the New York court’s discussion at the hearing that, when it stated that Phoenix’s objections were moot, it did not mean that it could not grant Phoenix any practical relief. Instead, the court concluded that Phoenix’s objections had no practical significance, i.e., no merit, in light of the express provisions in the indemnity agreement. Accordingly, we disagree with the Barbaras that the New York court’s decision granting Colonial’s motion to enforce the settlement was not on the merits.

²³ We note that our reasoning is different from that of the trial court. The trial court concluded that res judicata does not apply because “[t]he ‘claims’ that [Colonial] argues [the Barbaras are] precluded from bringing in the [Barbaras’] action were arguments raised by Phoenix in opposition to [Colonial’s] . . . motion [to enforce the settlement] in the [New York action].” In our plenary review of the court’s ruling, we, however, agree with Colonial that a “claim” for purposes of res judicata is not defined so narrowly. See, e.g., *Wheeler v. Beachcroft, LLC*, 320 Conn. 146, 159, 129 A.3d 677 (2016) (Our Supreme Court “has adopted the transactional test. . . . Under the transactional test, res judicata extinguishes 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.” (Citation omitted; internal quotation marks omitted.)). Nevertheless, because we conclude that the Barbaras did not have an adequate opportunity to litigate their claims, we affirm the judgment of the trial court on that basis. See, e.g., *Silano v. Cooney*, 189 Conn. App. 235, 241 n.6, 207 A.3d 84

(2019) (“[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason” (internal quotation marks omitted)).

²⁴ “An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.” N.Y. C.P.L.R. 2104 (McKinney 2023).

Thus, pursuant to CPLR 2104, a settlement agreement must be in writing and signed by the attorneys for the parties, and “a settlement agreement signed by an attorney may bind a client even where it exceeds the attorney’s actual authority, if the attorney had apparent authority to enter into the agreement” (Citations omitted.) *Servider v. New York*, 212 App. Div. 3d 475, 476, 179 N.Y.S.3d 897 (2023).

²⁵ Notably, Colonial cited *Bell BCI Co. v. Old Dominion Demolition Corp.*, supra, 294 F. Supp. 2d 807, in support of its motion to enforce the settlement in the New York action.

²⁶ Of course, we recognize that, because the Barbaras’ bad faith claims were litigated and decided adversely to the Barbaras in the indemnity action, on remand, Colonial may move for summary judgment in the Barbaras’ action on the basis of the preclusive effect of the judgment in the indemnity action.
