DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE Suite 9100
Washington, DC 20002
TEL: (202) 442-8167
FAX: (202) 442-9451

CARMEN SALAZAR,
Tenant/Petitioner,

v.

CAROL SUE VARNER, EXECTRIX,
FAIRBAIRN PROPERTIES, LLC,
Housing Providers/Respondents.

Case No.: RH-TP-09-29645

In re: 2426th 19th Street, NW, Unit 301

ORDER ON HOUSING PROVIDER'S MOTION TO DISMISS

I. INTRODUCTION

On July 8, 2009, Tenant/Petitioner Carmen Salazar filed TP 29,645 alleging the following violations of the Rental Housing Act of 1985: (1) the building was not properly registered; (2) her rent was increased while her unit was not in substantial compliance with the housing regulations; (3) services and facilities were substantially reduced; and (4) Housing Provider retaliated against Tenant.

On November 18, 2009, I issued a Case Management Order ("CMO") scheduling a hearing on December 18, 2009. Currently pending before this administrative court are Housing Provider's motion to dismiss the petition, filed on September 22, 2009; Tenant's motion to withdraw opposition to the motion to dismiss and for extension of time to file opposition to motion to dismiss; and Tenant's opposition to the motion to dismiss, filed on November 10 and 16, 2009.

On October 14, 2009, Tenant, acting *pro se,* filed "Petitioner's Verified Opposition to Respondent's Motion to Dismiss." Tenant subsequently obtained counsel who entered her notice of appearance on November 2, 2009. Counsel for Tenant requests to withdraw the *pro se* opposition and to file a new opposition to the motion to dismiss. Tenant's motion is granted. Tenant's *pro se* response will be stricken from the record and Tenant's November 16, 2009, opposition to Respondent's motion to dismiss is accepted for filing. However, Tenant's request to purge the *pro se* motion from the record in its entirety is denied. It is not appropriate to remove documents that have been filed in the record in the event that any aspect of the case is appealed in the future.

II. HOUSING PROVIDER'S MOTION TO DISMISS

Housing Provider moves to dismiss the petition on the grounds that Tenant's allegations are barred by the doctrine of *res judicata.* Under the doctrine of *res judicata* or *claim preclusion,* when a valid final judgment has been entered on the merits, the parties, or those in privity with them, are barred, in a subsequent proceeding, from relitigating the same claim or any claim that might have been raised. *Washington Medical Center, Inc., v. Holle,* 573 A.2d 1269, 1280-81 (D.C. 1990). The rationale is that the judgment embodies an adjudication of all the parties' rights arising out of the transaction involved. *Id.* Therefore, the prior adjudication "bars" claims actually raised, and those which the litigants failed to raise are said to "merge" into the prior judgment. *Id.*

Res judicata is an affirmative defense that must be pleaded and established by the proponent. *Johnson v. D.C. Rental Hous. Comm'n,* 642 A.2d 135, 139 (D.C. 1994). The party asserting an affirmative defense bears the burden of production and persuasion with regard to

that defense. OAH Rule 2020.3; *Id.* What the party seeking dismissal based on *res judicata* must prove is that (1) the claim was adjudicated finally; (2) the earlier litigation was based on the same cause of action; and (3) the parties are the same or in privity.

The parties in this case were also parties to a landlord-tenant action in the District of Columbia Superior Court, 2009 LTB 031200. An evidentiary hearing was held in that matter on January 16, 2009, at which time judgment for possession in favor of the Housing Provider was granted. Tenant has appealed that decision to the D.C. Court of Appeals. However, contrary to Tenant's argument, the pending appeal of the landlord-tenant case has no bearing on whether *res judicata* applies to the tenant petition.

In its motion, Housing Provider alleges that in the landlord-tenant case, Tenant also raised the issues that her rent was increased while her apartment was not in substantial compliance with the housing regulations, that services and facilities were reduced, and that Housing Provider filed legal action against Tenant in retaliation for her complaints. *Respt's Mot. To Dismiss at 2.* Housing Provider did not submit a final order from the Landlord-Tenant case and therefore there is no evidence of what was actually litigated in the LLT case; Housing Provider submitted only a copy of the docket sheet. Tenant, in opposition, argues that because of the doctrine of *primary jurisdiction*, this administrative court is not bound by the decision of the Landlord-Tenant Branch.

The doctrine of *primary jurisdiction* is concerned with promoting proper relationships between the courts and administrative agencies: "Primary jurisdiction comes into play whenever enforcement of the claim requires the resolution of issues, which under a regulatory scheme, have been placed within the special competence of an administrative body." *Bedell v. Clark,*

TP 24,979 (RHC Apr. 29, 2003) at 6 *citing Fisher v. Peters,* TP 23,261 (RHC Sept. 5, 1996). The Rental Housing Act confers primary jurisdiction upon this administrative court over the validity of rent levels and increases. *Kennedy v. D.C. Rental Hous. Comm'n,* 709 A.2d 94 n.1 (D.C. 1998); *Drayton v. Porestsky Mgmt., Inc.,* 461 A.2d 1115, 1120 (D.C. 1983). As a result, the Landlord/Tenant Branch of the Superior Court may not undertake to adjudicate the validity of a rent increase because it falls within "the special competence of this administrative court." As such, the only allegation in the tenant petition that falls within the *primary jurisdiction* of this administrative court is whether the property was properly registered. Whether the property was properly registered goes directly to the validity of the rent because rent cannot be increased if the property was not properly registered. 14 DCMR 4109.9.

Unlike the validity of rent increases, this administrative court and the D.C. Superior Court exercise concurrent jurisdiction over various claims that a party may raise in a tenant petition including services and facilities (which may be proven by showing the existence of housing code violations), retaliation, and notices to vacate. *Robinson v. Edwin B. Feldman Co.,* 514 A.2d 799 (D.C. 1986); *Bedell v. Clarke,* TP 24,979 (RHC Apr. 29, 2003) at 8. Therefore, Tenant could have raised, and was required to raise, retaliation and claims regarding reductions

in services and facilities that were caused by housing code violations as counterclaims in the Landlord/Tenant case.[1] Failure to do so may result in forfeiting those claims.

The District of Columbia Court of Appeals ("Court of Appeals") has held that an action for possession determines finally between the parties that "(1) there is a tenancy between the parties, (2) the lease between the parties is valid and (3) *rent due and owing by the tenant.*" *Davis v. Bruner,* 441 A.2d 992, 998 (D.C. 1982) (emphasis added) (Holding that "a prior default judgment in a suit for possession is *res judicata* as to those issues litigated and determined therein. Included litigated issues are the validity of the lease, the existence of the tenancy, and the fact that rent is due."). The Court of Appeals has further held that housing code violations are directly related to whatever rent is due for the period in question. *Id.* As such, Tenant was required to raise the issue of housing code violations in the possessory action.

It is undisputable that if Tenant raised issues of housing code violations, retaliation, and/or services and facilities as part of the landlord-tenant case, as suggested by Housing Provider's motion, *res judicata* bars her from raising those issues again in a tenant petition. It is also well established that if a defendant fails to assert a legal defense in the Landlord/Tenant Branch, the tenant may also be prohibited from raising it later in another proceeding under the doctrine of *res judicata. See Barton v. District of Columbia,* 817 A.2d 834, 841(D.C. 2003) (holding that the defendant was required to raise his racial discrimination claim, as a legal

[1] The Superior Court rules applicable to Landlord/Tenant actions state: "(b) Counterclaims. In actions in this Branch for recovery of possession of property in which the basis of recovery is nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the defendant may assert an equitable defense of recoupment or set-off or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. No other counterclaims, whether based on personal injury or otherwise, may be filed in this Branch. This exclusion shall be without prejudice to the prosecution of such claims in other Branches of the Court." D.C. SCR-LT Rule 5.

defense, in the eviction proceeding); *Shin v. Portals Confederation Corp.*, 728 A.2d 615, 619 (D.C. 1999) (holding that the tenant was barred by res judicata from suing the housing provider for false misrepresentation regarding the lease, where the tenant could have litigated that issue as part of his general denial of liability for rent). The same is true for Tenant's allegation of retaliation. Although there is no independent cause of action for retaliation, it is a well-recognized defense to a possessory action. *Twyman v. Johnson,* 655 A.2d 850, 856 (D.C. 1995) *(citing Edwards v. Habib,* 397 F.2d 687 (D.C. App. 1968) ("a tenant may assert the retaliatory motivation of his landlord as a defense to an otherwise proper eviction.")).

Tenant would not be barred however from raising issues of reductions in services and facilities, retaliation, or improper notices to vacate that occurred after January 16, 2009. Because the parties have not submitted the final order in the landlord-tenant action, I will hold Housing Provider's motion in abeyance and hold an evidentiary hearing on the motion.

Therefore, it is this **20th** day of **November 2009**:

ORDERED, that Tenant's motion to withdraw "Petitioner's Verified Opposition to Respondent's Motion to Dismiss" is **GRANTED;** and it is further

ORDERED, that Tenant's motion for an extension of time to file opposition to motion to dismiss is **GRANTED** *nunc pro tunc,* and Tenant's opposition to the motion to dismiss is accepted for filing; and it is further

ORDERED, that Housing Provider's motion to dismiss the tenant petition is held in abeyance;

ORDERED, this matter remains scheduled for a hearing on Housing Provider's motion to dismiss on **December 18, 2009, at 9:30 a.m.**, at the Office of Administrative Hearings, 941 North Capitol Street, NE, 9th Floor, Washington, DC 20002. **If you do not appear for the hearing, you may lose your case. All other provisions of the November 18, 2009, Case Management Order remain in effect.**

Erika L. Pierson
Administrative Law Judge

Certificate of Service:

By First Class Mail
(Postage Paid):

Joyce M. Kosak, Esquire
ALBRIGHT & RHODES, LLC
200-A Monroe Street, Suite 305
Rockville, MD 20850

Mark Raddatz, Esquire
Raddatz Law Firm, PLLC
1627 Connecticut Avenue, NW
Suite 6, Third Floor
Washington, DC 20009

I hereby certify that on 11-20, 2009, this document was caused to be served upon the above-named parties at the address(es) and by the means stated.

Benidda Rhames
Clerk / Deputy Clerk