SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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WESTMAN REALTY COMPANY, LLC,

Plaintiff,

- v -

STEVEN NETTLES, ELLEN LAGOW NETTLES

Defendants.

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INDEX NO. 159605/2020

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193

were read on this motion to/for RESTORE PRIOR MOTION.

In this landlord-tenant action for unpaid rent, plaintiff-landlord Westman Realty Company, LLC (Westman) moves (mot seq no 004): (1) pursuant to the July 6, 2022 order (NYSCEF Doc No 164), to vacate the stay in this action and renew plaintiff's prior motion (mot seq no 003) seeking to dismiss defendants' seventh affirmative defense (improper service), eighth affirmative defense (harassment by denying defendants the rent regulatory status of defendants' apartment), ninth affirmative defense (unlawful rent demand containing an illegal rent overcharge), and second counterclaim (illegal and fraudulent rent overcharge); (2) pursuant to CPLR § 3025 [b], to amend the complaint to include all rent due through November 30, 2022; (3) for an order directing defendant-tenants Steven and Ellen Nettles to deposit into court outstanding arrears and use and occupancy *pendente lite* at the rate set forth in the current lease; and (4) pursuant to CPLR § 2004, to extend the time to file a note of issue.

Defendants oppose that portion of plaintiff's motion to dismiss their eighth and ninth affirmative defenses and second counterclaim as well as the request to deposit rent into court, but

do not oppose restoring the previously submitted motion for determination nor plaintiff's request to extend the note of issue date.

BACKGROUND

On September 7, 2007, defendants signed a residential lease with plaintiff for unit 13E at the apartment building (or premises), located at 697 West End Avenue, New York, New York 10025 (Complaint, ¶¶ 3-5, NYSCEF Doc No 1). According to defendants in their memorandum of law in opposition to motion sequence no 003, that same year, plaintiff received J-51 benefits, obligating it to provide rent stabilized leases under New York Rent Stabilization Law (RSL) § 26-504 [c] (NYSCEF Doc No 148, pp 4-7). While the initial lease was not rent stabilized, plaintiff offered defendants a rent-stabilized renewal lease commencing on December 1, 2018, and expiring on November 30, 2020 (Renewal Lease, NYSCEF Doc No 186). The most recent renewal lease for the period of December 1, 2020 through November 30, 2022, sets the monthly rent at $4,800.00 through November 30, 2021, and then $4,848.00 from December 1, 2021 through November 30, 2022 (NYSCEF Doc No 186).

On February 12, 2018, defendants commenced an action against plaintiff (*Nettles v Westman Realty Mgt. Co.* [Sup Ct, NY County, No. 151296/2018] [2018 Action]) alleging that plaintiff failed to provide them with rent stabilized leases and at regulated rents in violation of RSL (NYSCEF Doc No 1, ¶ 10). By decision and order dated September 21, 2018 (d'Auguste, J), the claims were dismissed, reasoning that "the New York State Division of Housing and Community Renewal [DHCR] has primary jurisdiction over [defendants'] claims" (2018 Decision, NYSCEF Doc No 182). Then on July 29, 2019, defendants commenced another action (*Nettles v Westman Realty Co.* [Sup Ct, NY County, No. 157349/2019] [2019 Action]) against plaintiff alleging that plaintiff failed to provide rent stabilized leases and regulated rents pursuant

to the newly enacted Housing Stability and Tenant Protection Act (HSTPA) (NYSCEF Doc No 1, ¶ 15). By decision and order dated June 18, 2020 (Perry, W. Franc, J), the claims were dismissed on *res judicata* grounds (2019 Decision, NYSCEF Doc No 183). Plaintiff avers, undisputedly, that defendants did not appeal or seek leave to reargue or renew either decision (Bodoff Affirm, ¶ 45, NYSCEF Doc No 166).

Defendants have not paid rent since May 2020 (NYSCEF Doc No 1, ¶ 20). On November 9, 2020, plaintiff commenced this action for unpaid rent, use and occupancy, and other relief (*id.*). On July 6, 2022, the action was stayed pending defendants' application for Emergency Rental Assistance Program (ERAP) funds (2022 Order, NYSCEF Doc No 168). Defendants were awarded, and plaintiff received, $72,144.00 in ERAP funds, covering rent from May 2020 through April 2021, as well as April 2022 through June 2022 (NYSCEF Doc No 166, ¶¶ 22-23). Defendants still owe $77,232.00 in unpaid rent for the months of May 2021 through March 2022 and July 2022 through November 2022 (*id.* at ¶ 26).

DISCUSSION

Vacate the Stay / Renew Motion Sequence No 003

Upon renewal, plaintiff first seeks to dismiss defendants' seventh affirmative defense of improper service. Defendants' bill of particulars does not address how plaintiff's service on them was improper nor do defendants set forth any argument for improper service in their opposition papers (*see* Defendants' BP, ¶ 12, NYSCEF Doc No 180). Defendants' conclusory denial of service in their answer is insufficient to rebut plaintiff's *prima facie* evidence of proper service (*Wells Fargo, N.A. v Javier*, 179 AD3d 482 [1st Dept 2020]). Accordingly, defendants' seventh affirmative defense will be dismissed (*see* CPLR § 3211 [b]).

Plaintiff next seeks to dismiss defendants' eighth affirmative defense of harassment by denying defendants' their rent regulated apartment, ninth affirmative defense of an unlawful rent demand containing an illegal rent overcharge, and second counterclaim of an illegal and fraudulent rent overcharge, all based on the doctrines of "law of the case," *res judicata*, and/or collateral estoppel. Plaintiff argues these doctrines apply because defendants' identical rent overcharge claims were already dismissed in two prior actions and cannot be brought again in this action. Defendants argue that the HSTPA permits defendants to bring rent overcharge claims in this Court and additionally, they are not precluded by the previous decisions because the prior actions were dismissed on jurisdictional grounds, not substantive grounds. For the reasons that follow defendants are not precluded from raising the rent regulatory status of their apartment and the concomitant affirmative defenses and counterclaim pertaining to the rent regulatory status.

Law of the Case

"Law of the case" only addresses the potential preclusive effect of judicial determinations made by courts of coordinate jurisdiction before final judgment and in the course of a *single litigation* (*see People v Evans*, 94 NY2d 499, 502 [2000]). It is "characterized as a kind of intra-action res judicata" (*id.*). Therefore, since the prior determinations were made in two separate actions from the instant action, defendants eighth and ninth affirmative defenses and second counter claim are not precluded by the "law of the case" doctrine.

Res Judicata

"Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*see Simmons v Trans Express Inc.*, 37 NY3d 107, 111 [2021] [internal quotations omitted]). In order for there to be a valid final judgment, "a disposition on the merits" must be made "between the same parties, or those in

privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Clerico v Pollack*, 148 AD3d 769, 770 [2d Dept 2017]). "A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it [is] specified otherwise" (CPLR § 5013). And "courts are loath to enter a judgment on the merits when the grounds for the dismissal are purely technical" (10 NY Civil Practice: CPLR P 5013.02; *see Matter of B.Z. Chiropractic, P.C. v Allstate Ins. Co.*, 197 AD3d 144, 159 [1st Dept 2021] ["dismissal of the First Petition for improper service of process is not a dismissal on the merits"]). "Ultimately, the application of the transactional approach to claim preclusion seeks to prevent litigants from taking two bites at the apple; however, in properly seeking to deny litigants two days in court, we must be careful not to deprive them of one" (*Simmons*, 37 NY3d at 112 [internal quotations and parentheses omitted]).

Here, neither the 2018 nor 2019 decision dismissed defendants' case on the merits (*i.e.,* whether the apartment is rent stabilized under RSL). The 2018 decision dismissed the complaint based on jurisdictional grounds (*see Kokoletsos v Semon*, 176 AD2d 786 [2d Dept 1991] [a determination by a court that it lacks jurisdiction is not considered a decision on the merits]; *see also* 10 NY Civil Practice: CPLR P 5013.02). And the 2019 decision dismissed the action before defendants submitted evidence supporting their position that their apartment is subject to the RSL (*see* CPLR § 5013). Not only did the 2018 and 2019 decisions not reach the merits of defendants' claims, but they did not result in a judgment (*see Simmons*, 37 NY3d at 107 [2021] [requiring a valid final judgment for *res judicata* to apply]). Therefore, defendants' eighth and ninth affirmative defenses and second counter claim are not precluded by the doctrine of *res judicata*.

Collateral Estoppel

"Collateral estoppel or issue preclusion . . . prevents a party from relitigating in a subsequent action or proceeding an *issue* clearly raised in a prior action or proceeding and decided against that party whether or not the causes of action are the same" (*id.* at 112 [internal quotations and ellipses omitted]). "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior action . . . and is decisive of the present action" (*Matter of A. Ottavino Prop. Corp. v Inc. Vil. of Westbury*, 203 AD3d 920, 921 [2d Dept 2022]). "[T]he party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination" (*id.*). Additionally, issue preclusion generally applies to the "application of law to facts or the expression of an ultimate legal conclusion" (*Capstone Bus. Funding, LLC v Shames Constr. Co., Ltd.*, 205 AD3d 606, 607 [1st Dept 2022]).

Here, plaintiff has not met its burden of establishing that the issue of the rent regulatory status of defendants' apartment was decided against defendants since neither the 2018 decision nor the 2019 decision ruled on defendants' apartment's rent regulatory status. Therefore, defendants' eighth and ninth affirmative defenses and second counter claim are not precluded by the doctrine of collateral estoppel.

Accordingly, defendants are not precluded from raising the rent regulatory status of their apartment in this action and plaintiff's application to dismiss defendants' eighth and ninth affirmative defenses, and second counterclaim will be denied.

Amending the Complaint

Plaintiff moves unopposed and pursuant to CPLR § 3025 [b] for leave to amend its complaint to reflect $77,232.00 in unpaid rent that has accrued through November 30, 2022. Plaintiff establishes that the amendment has merit (*see Horn v Nestor*, 172 AD3d 659 [1st Dept 2019]) and there is no undue prejudice to defendants (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Accordingly, plaintiff's application to amend its complaint will be granted.

Rent Deposit

Plaintiff seeks an order directing defendants to deposit all outstanding rent as well as use and occupancy *pendente lite* into court. Defendants argue the deposit with the court is not appropriate considering their allegations of an illegal rent overcharge the value of which has yet to be determined.

Real Property Law (RPL) § 220 provides that a landlord "may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement." The court has broad discretion to award use and occupancy *pendente lite* (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]). However, "[w]here contested, it becomes the landlord's burden to prove the reasonable value of the use and occupation of the premises" (*Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011]). If there exist genuine issues of fact as to the amount, it is not appropriate to require defendants to deposit use and occupancy in the court (*see Bozzi v Goldblatt*, 160 AD2d 647, 648 [1st Dept 1990] ["where the amount is in controversy and may be offset by rent overcharges alleged by plaintiff, [defendant] should not be required to deposit use and occupancy into court"]; *see also Grinnell Hous. Dev. Fund Corp. v McClain-James*, 240 AD2d 203, 203-04 [1st Dept 1997] ["the deposit of maintenance arrears into court

was not justified by plaintiff's showing on the merits, there being many unresolved issues of fact bearing upon defendant's right to a rent abatement, and thus upon plaintiff's right to the full amount of the arrears it seeks"]).

Here, plaintiff has not produced sufficient evidence to meet its burden that it did not provide an unlawful lease to defendants in contravention of RSL. Indeed, plaintiff does not address in its motion papers whether it received J-51 tax benefits, thereby requiring it to offer its tenants rent-stabilized leases. Defendants' counsel submits by affirmation details of the premises' J-51 status (*see* NYSCEF Doc No 190, ¶¶ 6-7) creating an issue of fact whether plaintiff received J-51 tax benefits and correspondingly, was obligated to provide rent stabilized leases under RSL. Accordingly, plaintiff's application for an order directing defendants to deposit all outstanding rent and use and occupancy *pendente lite* into court will be denied.

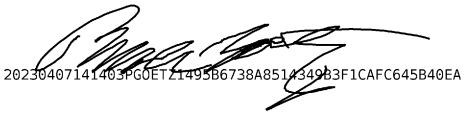
Extend Notice of Issue Date

Plaintiff moves unopposed, pursuant to CPLR § 2004, to extend the notice of issue filing date of December 30, 2022. Accordingly, plaintiff's application to extend the notice of issue filing date will be granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that the stay placed on this action is vacated permitting renewed consideration of motion sequence no 003, defendants' seventh affirmative defense is dismissed, plaintiff is granted leave to amend its complaint in the form annexed to the motions papers and shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action, the date by which the

note of issue is to be filed is extended to September 30, 2023, and the motion is otherwise denied.



4/7/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE