No. 12-CV-0168

DISTRICT OF COLUMBIA COURT OF APPEALS

BYRON S. MITCHELL,

Appellant,

v.

ANNIE GALES,

Appellee.

On appeal from the Superior Court
of the District of Columbia, Civil Division

BRIEF OF APPELLANT

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STATEMENT PURSUANT TO RULE 28 (A)(2)(A)

The parties in this case are Byron S. Mitchell, the Appellant, and his former landlord, Annie Gales, the Appellee. (Appellee's name is misspelled in the official caption of this case. Her actual name is Annie Gales.)

Mr. Mitchell acted *pro se* on his Tenant Petition (No. 29,902) and in his Small Claims Court suit (No. 2010 SC3 3007). Mr. Mitchell was later represented before the Superior Court in his Application for Entry of Administrative Agency's Final Order as Judgment (No. 2011 CA 1246) by Lindsey Miles-Hare, Esq. of the Bread For The City Legal Clinic. Mr. Mitchell is represented before this Court by John C. Keeney, Jr., Esq. and Kyle J. Fiet, Esq. of the Legal Aid Society of the District of Columbia.

Ms. Gales was represented in the Small Claims Court suit by Mr. Bernard A. Gray Sr., Esq. She acted *pro se* on the Tenant Petition. She was represented in the Superior Court and in this Court by Mr. Craig A. Butler, Esq. of The Butler Law Group, PLLC.

There are currently no intervenors or *amici curiae* in this matter.

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QUESTIONS PRESENTED

A tenant, proceeding *pro se*, sought contract damages in Small Claims Court and equitable relief, including from retaliation, in the District of Columbia Rental Accommodations and Conversion Division ("RACD") after his landlord failed to make essential repairs to his apartment and notified him that she planned to evict him. After decisions in favor of the tenant in both matters, the Superior Court refused to reduce the RACD's final order on the tenant petition to a judgment on the sole ground that the RACD proceeding was precluded by the Small Claims action, although no claim preclusion or *res judicata* defense had been timely raised before the RACD. This appeal raises the following questions:

1. Did the Superior Court err by entertaining a collateral attack of *res judicata* on Appellant's motion to reduce the RACD's final administrative order to judgment?

2. Did the Superior Court err by holding that *res judicata* barred entry of judgment on the RACD's final order where the order included a retroactive rent reduction for housing code violations that occurred after the Small Claims Court judgment on which the *res judicata* argument was based?

3. Did the Superior Court err by refusing entry of judgment altogether rather than applying the traditional remedy of offset and entering judgment on the reduced amount?

STATEMENT OF THE CASE

Appellant, Byron S. Mitchell, rented a room from Appellee, Annie Gales. Following a housing inspection report, which itemized serious housing code violations and determined that

the room was "not habitable," Final Order 3 (A21),[1] Mr. Mitchell filed and duly served on Ms. Gales a May 25, 2010 breach of contract suit in the Small Claims Branch of the Superior Court (No. 2010 SC3 3007) and a June 4, 2010 Tenant Petition (No. 29,902) in the District of Columbia Rental Accommodations and Conversion Division ("RACD").

Mr. Mitchell, *pro se*, prevailed in both matters. Following an evidentiary hearing, during which Ms. Gales was represented by counsel, the Small Claims Court entered a July 15, 2010 judgment of $900 in favor of Mr. Mitchell. Small Claims J. (A17). On the Tenant Petition, Ms. Gales did not attend any of the hearing dates, and the administrative law judge chose to take evidence from Mr. Mitchell in her absence. Final Order 2, 4 (A20, 22). On January 7, 2011, the ALJ issued a Final Order, which declared that Mr. Mitchell was entitled to a retroactive rent refund of $13,014.32 for June 2007 through October 2010 plus interest. *Id.* at 8-9 (A26-27).

On February 15, 2011, Mr. Mitchell filed an application with the Superior Court for entry of the Final Order as a judgment pursuant to Super. Ct. Civ. R. 12-I (b)(i) (No. 2011 CA 1246) (the "Application") (2/15/2011). Ms. Gales filed a Motion to Dismiss, arguing *res judicata* based on the earlier Small Claims Court judgment. Mot. to Dismiss ¶¶ 9-10 (7/1/2011). Mr. Mitchell, through counsel, objected to this collateral attack on the enforceability of the Final Order. Under District of Columbia law, affirmative defenses—such as *res judicata*—are waived if not asserted during the underlying administrative proceedings. Pl. Opp'n 6-8 (7/18/2011). Moreover, only the Final Order (rather than the Small Claims judgment) covered the months of August, September, and October 2010 and, therefore, *res judicata* did not apply. *Id.* at 8-9.

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[1] Documents in the Appendix are cited (A--) indicating the page in the Appendix where the document can be found. Citations to briefs and motions in the record in Superior Court are followed with a parenthetical indicating the date the document was filed.

On January 17, 2012, the Superior Court (Tignor, J.) dismissed Mr. Mitchell's Application and refused entry of judgment on the Final Order. Super. Ct. Order (A35). In so doing, the court declined to apply the rule against collateral attack, explaining that "[w]hile it is certainly preferable that a claim of *res judicata* be presented prior to any subsequent litigation[,] this court concludes that Defendant's failure to do so within the procedural context of this case does not bar it[s] applicability." *Id.* The court never addressed Mr. Mitchell's argument that the Small Claims Court and RACD awards covered different time periods. *See id.*

Mr. Mitchell timely appealed. Shortly after the notice of appeal, Mr. Mitchell was evicted from his apartment. He is currently homeless.

STATEMENT OF FACTS

In June 2007, Byron S. Mitchell began renting a basement room from Annie Gales, for $425 per month. Final Order 2, 9 (A20, 27). From the day that Mr. Mitchell first moved in, the room had exposed electrical wires, gaps in the ceiling, and holes in the walls. *Id.* at 3 (A21). A broken drainage pipe from an upstairs bathroom allowed urine and feces to flow directly into Mr. Mitchell's room. *Id.* The unit was moldy, and it had bedbugs and mice. *Id.* The bathroom had no door, and its wall was flimsy and unstable. *Id.* The floor was missing parts; the ceiling was damp; and there was no smoke detector. *Id.* Moreover, the rental unit had no emergency egress. *Id.* When Mr. Mitchell informed Ms. Gales about some of these problems, she responded that he would simply have to "live with it." *Id.*

Faced with Ms. Gales' refusal to make repairs, Mr. Mitchell requested that a Housing Inspector from the District of Columbia Inspections and Compliance Administration inspect the room. This inspection took place on May 5, 2010. Inspection Report (A7-13). The Housing Inspector's written report found numerous serious housing code violations and proposed $5,800

in civil fines if repairs were not timely made. *Id.* Indeed, the condition of the room was so poor that the Housing Inspector declared that it was "not habitable" in its current state. Final Order 3 (A21).

On May 14, 2010, nine days after this inspection, Ms. Gales gave Mr. Mitchell a note stating that she was selling the property and that Mr. Mitchell had 30 days to vacate. *Id.* Mr. Mitchell filed a breach of contract suit against Ms. Gales in Small Claims Court on May 25, 2010. Compl. (A14). On June 4, 2010, Mr. Mitchell filed a Tenant Petition with the RACD, alleging reduction in services during his tenancy and service of an improper notice to vacate. *See* Final Order 1 (A19).

The Small Claims suit moved faster than the Tenant Petition. On July 15, 2010, the Small Claims Court held an evidentiary hearing during which Mr. Mitchell was *pro se* and Ms. Gales had counsel, *see* Small Claims Docket (A4-5), and entered a judgment of $900 against Ms. Gales. Small Claims J. (A17). Thereafter, the Office of Administrative Hearings ("OAH") scheduled an evidentiary hearing on Mr. Mitchell's Tenant Petition. The hearing was to be held October 4, 2010; however, despite receiving proper notice, Ms. Gales did not appear. Final Order 2 (A20). The following day, Ms. Gales filed a document with the OAH explaining that she did not attend the hearing because her attorney incorrectly informed her that the hearing would be held on October 5 rather than October 4. *Id.* The ALJ rescheduled the hearing for December 1, 2010; however, despite receiving notice of the new date, Ms. Gales again failed to appear. *See id.*

The ALJ explained that, given Ms. Gales' repeated absence, she would make a ruling based on the evidence presented by Mr. Mitchell. Final Order 4 (A22) (citing OAH Rule 2818.3). Based on this undisputed evidence, which included the official housing inspection

report, the ALJ issued a Final Order on January 7, 2011, which contained detailed Findings of Fact and Conclusions of Law. *Id.* at 8 (A26). The ALJ found that the condition of the rental unit was so substandard that Mr. Mitchell had been left "with little more than a roof over his head" and that Mr. Mitchell was entitled to a $300 per month reduction in rent from the beginning of his tenancy through October 2010. *Id.* at 5 (A23). With interest, the total amount of the award was $13,014.32. *Id.* at 8 (A26). The ALJ also determined that the notice to vacate was invalid, but declined to impose a fine, deeming the violation no "worse than bad judgment" on the landlord's part. *Id.* at 7 (A25).

On February 15, 2011, Mr. Mitchell filed an Application with the Superior Court seeking entry of the Final Order as a judgment pursuant to Super. Ct. Civ. R. 12-I (b)(i). Application (2/15/2011). Ms. Gales filed a motion with the Superior Court to dismiss or stay Mr. Mitchell's Application (7/1/2011) and a separate motion with the OAH for relief from the Final Order. The Motion for Relief argued that Ms. Gales' had been unable to attend the December 1, 2010 hearing and, for the first time, contended that *res judicata* barred the RACD action. On June 8, 2011, the OAH denied Ms. Gales' Motion for Relief as untimely. Order Den. Mot. For Relief 2 (A31).[2] Nonetheless, Ms. Gales' continued to press the Superior Court to deny Mr. Mitchell's Application for entry of the Final Order as a judgment. Specifically, she argued *res judicata* because "the claims in the Complaint in the Small Claims Case are identical to the claims in this matter [*i.e.*, the RACD Tenant Petition]." Mot. to Dismiss ¶ 9 (7/1/2011). In her Motion to

[2] The ALJ explained that under OAH Rules 2828.9 and 2812.5, a motion for relief from a final order must be filed within 120 days after service, plus five days for service by mail. Order Den. Motion For Relief 1 (A30). Because Ms. Gales did not file her Motion for Relief within this time period, her motion was untimely and the OAH's Rules did not give the ALJ any discretion to consider it. *Id.* at 1-2 (A30-31) (citing OAH Rule 2812.6, which removes the ALJ's discretion to extend the deadlines in OAH Rule 2828).

Dismiss, Ms. Gales did acknowledge missing the hearings, but insisted, despite what she had represented to the ALJ after she missed the first hearing date, that it was because of infirmity and illness. *See id.* ¶¶ 3, 4. In the alternative, Ms. Gales asked that the court place a *Drayton* stay on Mr. Mitchell's Application because she had appealed the denial of her Motion for Relief to the Rental Housing Commission ("RHC").[3] *See id.* ¶¶ 11, 12.

In response, Mr. Mitchell argued that D.C. law does not allow a disappointed litigant, like Ms. Gales, to collaterally attack the Final Order by raising affirmative defenses—such as *res judicata*—that were available to her during the underlying administrative proceedings. Pl. Opp'n 6-8 (7/18/2011). Moreover, Mr. Mitchell argued that, *even if* this type of collateral attack were allowed, the court should, at a minimum, enforce the portion of the Final Order covering August 2010 through October 2010 because these months could not have been covered by the Small Claims Court's *July 15, 2010* judgment. *Id.* at 8, 9.

At a July 25, 2011 hearing on Mr. Mitchell's Application, the Superior Court expressed concern that granting the Application would give Mr. Mitchell a double recovery for his injuries

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[3] This request for a *Drayton* stay was meritless. A *Drayton* stay applies only where a tenant petition alleges a rent increase in violation of the District's rent control laws. *Drayton v. Poretsky Mgmt. Inc.*, 462 A.2d 1115, 1122 (D.C. 1983); *Robinson v. Edwin B. Feldman Co.*, 514 A.2d 799, 800 (D.C. 1986). Here, rent control was not at issue in either Mr. Mitchell's Tenant Petition or Ms. Gales' appeal to the RHC. On June 24, 2011, Ms. Gales appealed the OAH's denial of her Motion for Relief to the RHC, asserting that the ALJ should have followed the "guidance" found in the Superior Court's Rules of Civil Procedure—which allow more time to file a motion for reconsideration—rather than follow the OAH's actual procedural rules. *See* Notice of Appeal (A33). Although the Notice of Appeal does not cite any legal authority for this argument, it appears to be based on OAH Rule 2801.1, which allows an ALJ to look to the Superior Court's Rules of Civil Procedure for "guidance," where the OAH's Rules "do not address a procedural issue." However, OAH Rules 2828.9 and 2812.6 specifically address the timing of a motion for reconsideration, so Rule 2801.1 is inapplicable. See *supra* note 2. To date, the RHC has not taken any action on this appeal. No briefing schedule has been issued, and no hearing date has been set.

and allowed the parties to provide supplemental briefing on this issue. *See* Pl. Supp. Mem. 2 (8/1/2011).

On January 17, 2012, the Superior Court denied Mr. Mitchell's Application in its entirety. It explained that there was "no case directly on point from our Court of Appeals" and, "[w]hile it is certainly preferable that a claim of *res judicata* be presented prior to any subsequent litigation[,] . . . Defendant's failure to do so within the procedural context of this case does not bar [its] applicability." Super. Ct. Order (A35).

STANDARD OF REVIEW

This Court reviews *de novo* the Superior Court's rulings of law such as the collateral attack prohibition and the application of *res judicata*. *See Calomiris v. Calomiris*, 3 A.3d 1186, 1190 (D.C. 2010); *Elwell v. Elwell*, 947 A.2d 1136, 1139 (D.C. 2008).

SUMMARY OF ARGUMENT

The Superior Court erred in refusing to enter judgment on the Final Order. Under District of Columbia law, it is fundamental that, in an action to enforce a judgment, no defense can be asserted that was available to the defendant in the underlying administrative proceedings. Because the *res judicata* defense was available to Ms. Gales during the hearing on Mr. Mitchell's RACD Tenant Petition, the defense merged into the merits of the Final Order, and it was error for the Superior Court to allow her to assert it for the first time in a collateral attack on Mr. Mitchell's Application. In any event, the *res judicata* defense could not have applied to the entirety of the Final Order because it included rent reductions for several months of uncorrected housing code violations that occurred *after* the Small Claims action was over. Moreover, any double recovery concern only required the Superior Court to offset the amount of the RACD rent

reduction by the amount of the Small Claims Court judgment. It did not permit the Superior Court to refuse to enforce the RACD award at all.

ARGUMENT

I. The Superior Court Erred by Allowing a Collateral Attack to Bar Judicial Enforcement of The RACD's Final Order.

Under controlling District of Columbia law, "[i]t is fundamental that[,] in an action on a judgment[,] the original cause of action cannot be examined on the merits, the area of attack being limited to jurisdiction and fraud in procurement. Moreover, no item of defense may be asserted that existed prior to the judgment and which might have been set up in the original proceedings." *Indemnity Ins. Co. v. Smoot*, 152 F.2d 667, 669, 80 U.S. App. D.C. 287, 289 (1945) (emphases added) (citations omitted). *See also* Restatement (Second) of Judgments § 18(2) ("In an action upon [a] judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action."); *Threatt v. Winston*, 907 A.2d 780, 782 n.3 (D.C. 2006) ("A defendant is barred from relitigating a defense which was available in a prior action by making it the basis of a claim that would nullify the initial judgment or would impair rights established in the initial action." (quotation omitted)).

The fact that the Final Order is an administrative "decision" rather than a "judgment" does not change the analysis. This Court has explained that "[t]echnically, the RHC issues a 'decision,' not a 'judgment.' . . . Conceptually, however, a court action to enforce an agency decision awarding money damages is analogous to a suit upon a money judgment. Accordingly, the rules governing merger of finally adjudicated claims into a judgment and the use of *res judicata* to bar collateral attack on the underlying merits of a final judgment are applicable in the context here." *Strand v. Frenkel*, 500 A.2d 1368, 1373 n.9 (D.C. 1985).

This rule against collateral attack on final judgments is rooted in the "'[r]espect for the finality of judgments [that] is deeply ingrained in our legal system.'" *Threatt, supra*, 907 A.2d at 784 (quoting *Olivarius v. Stanley J. Sarnoff Endowment for Cardiovascular Sci., Inc.*, 858 A.2d 457, 466-67 n.5 (D.C. 2004)) (first alteration in original). Indeed, "as a general principle, the 'orderly administration of justice and comity between courts are served by requiring [disappointed litigants] to seek relief in the court that rendered the judgment,'" *id.* (quoting Restatement (Second) of Judgments, ch. 5, intro. note, cmt. a) (emphasis added), rather than allowing them to raise untimely defenses that they failed to assert in the earlier litigation.

Under this rule, Ms. Gales should not have been permitted to raise *res judicata* in the Superior Court to challenge the enforceability of the Final Award. *Res judicata* is an affirmative defense, which is waived unless timely asserted in the first forum. *See, e.g.*, Super. Ct. Civ. R. 8 (c) (describing *res judicata* as an "affirmative defense" which must be "set forth affirmatively" in the answer to a complaint); *Stone v. McConkey*, 761 A.2d 276, 277 (D.C. 2000) (holding that *res judicata* is an "affirmative defense" which is "subject . . . to waiver if not raised in the answer or timely asserted thereafter").[4] Because this defense was available to Ms. Gales during the Tenant Petition proceedings, it was error for the Superior Court to allow her to belatedly raise it when Mr. Mitchell applied for an entry of judgment on the Final Order. *See Indemnity Ins. Co., supra*, 152 F.2d at 669, 80 U.S. App. D.C. at 289 (no defense that was available in the underlying proceeding can be raised to block enforcement of a judgment).

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[4] *See also* Wright, Miller & Cooper, Fed. Practice & Procedure, Jurisdiction 2d § 4405 (at 83-84) ("The fundamental premise of the requirement that preclusion be pleaded and proved is that a party entitled to demand preclusion is also entitled to waive it."); *USPS v. NLRB*, 969 F.2d 1064, 1069, 297 U.S. App. D.C. 64, 69 (1992) (noting that "courts do not force preclusion pleas on parties who choose not to make them").

This Court's decision in *Strand v. Frenkel*, 500 A.2d 1368 (D.C. 1985), illustrates the application of this rule in the context of a tenant petition. In *Strand*, a group of tenants filed a petition with the Rental Accommodations Office alleging rent overcharges under the Rental Housing Act of 1975. *Id.* at 1369. The Rent Administrator awarded the tenants $6,879.23, which included treble damages plus interest. *Id.* at 1370. The landlords appealed this award to the RHC, which affirmed the award. *Id.* Instead of appealing the RHC's decision to the Court of Appeals, the landlords waited until the tenants filed an application to enforce the award in Superior Court and launched a collateral attack on its validity. *See id.* Specifically, the landlords' collateral attacks included that the tenants lacked standing, that their action was barred by the statute of limitations, and that they failed to join indispensable parties. The Superior Court denied the application to enforce on the grounds asserted by the landlords. *Id.*

On appeal, this Court reversed and remanded to the Superior Court with instructions to enter judgment for the tenants in the full amount originally awarded by the Rent Administrator. *Id.* at 1369. In so doing, the Court explained that there is a fundamental difference between

> (1) an administrative proceeding (such as [the hearing that was held before the Rent Administrator]) to establish liability for those overcharges[;] and (2) a later court action (such as this one) to enforce a finally adjudicated liability for those overcharges. The former finally determines the merits of the claim after final agency action and (if requested) appellate court review. The later is a new, wholly independent trial court action to enforce, in effect, a final judgment into which the merits of the original claim have merged. *Because of such merger, the underlying merits of the judgment are immune from collateral attack in an enforcement action; principles of claim preclusion (res judicata) bar such inquiry.*

Id. at 1373 (emphasis added) (citations omitted). Moreover, the Court reaffirmed that that "[t]he only defenses to a timely action filed upon a final judgment are lack of forum jurisdiction and procurement of the judgment by fraud." *Id.* at 1373 n.8 (emphases added).[5]

So too here. The appropriate time for Ms. Gales to raise the *res judicata* defense was during the administrative proceedings on Mr. Mitchell's Tenant Petition. Therefore, it was error for the Superior Court to allow her to raise it belatedly to challenge the validity of the RACD's final award.

It is telling that, in dismissing Mr. Mitchell's Application on *res judicata* grounds, the Superior Court struggled to find *any* legal authority supporting its decision. Indeed, the Superior Court asserted that there did not appear to be any cases from this Court that were on point. Super Ct. Order (A35). The court never explained why the clearly stated rule against collateral attack in *Indemnity Insurance Co.* and *Strand* was not dispositive. Ultimately, its only authority was a single "*cf.*" cite to *Osei-Kuffnor v. Argana*, 618 A.2d 712 (D.C. 1993).

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[5] There is no serious argument that the RACD, the OAH, or the Superior Court lacked jurisdiction. *See* D.C. Code § 2-1831.03 (b-1)(1) (2012) (giving OAH jurisdiction over "adjudicated cases" under the Rental Housing Act); D.C. Code § 42-3502.18 (2012) (allowing enforcement of administrative orders under the Rental Housing Act in Superior Court); Super. Ct. Civ. R. 12-I (b)(i) (governing entry of an administrative agency's final order as a judgment). Nor is there any basis to assert that Mr. Mitchell procured the Final Order through fraud. Before the Superior Court, Ms. Gales repeatedly suggested that it was inappropriate for Mr. Mitchell not to have raised the *res judicata* defense for her in her absence. However, the failure of a *pro se* litigant to raise a defense for an opposing party is not fraud. *See, e.g., Domino Media, Inc. v. Kranis*, 9 F. Supp. 2d 374, 388-89 (S.D.N.Y 1998) (applying New York law) ("Collateral attack on the grounds of fraud must demonstrate 'fraud in the very means by which the judgment was procured,' not merely perjury in the trial giving rise to the judgment."). Indeed, *res judicata* is an affirmative defense, and after Ms. Gales did not attend the OAH hearings, or retain counsel to represent her (as she did in the Small Claims case), Mr. Mitchell was under no obligation to argue Ms. Gales' case for her.

But the Superior Court's reliance on *Osei-Kuffnor* was badly misplaced. In *Osei-Kuffnor*, this Court addressed only the question of whether, under Super. Ct. Civ. R. 8 (c), the trial court can permit a defendant who fails to plead *res judicata* as an affirmative defense in the answer to a complaint to raise the defense on a motion to dismiss *while the case is still pending before the original trial court and is still in the pleading stage.*[6] There is nothing in *Osei-Kuffnor* to suggest that the Superior Court can allow a disappointed litigant to attack the final judgment of a fellow court (or agency) by asserting defenses that she failed to raise in the earlier litigation. Indeed, such a holding would be plainly contrary to law. *See, e.g., Bd. of County Comm'rs v. Baden Volunteer Fire Dep't*, 264 A.2d 844, 847 (Md. 1970) ("Even if the judgment or decree is erroneous or voidable, matters which might have been raised as a defense in the original action cannot be made the basis of a collateral attack." (citations omitted)); *Wesko v. G.E.M., Inc.*, 310 A.2d 191, 195 (Md. Ct. App. 1973) (same); Restatement (Second) of Judgments § 18, cmt. c ("When the plaintiff brings an action upon the judgment, the defendant cannot avail himself of defenses which he might have interposed in the original action. . . . It is immaterial whether he interposed the defense or failed to do so or even defaulted in the original action.").[7]

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[6] In *Osei-Kuffnor*, the defendant failed to plead *res judicata* as an affirmative defense in her answer to the plaintiff's complaint, but she did raise it as part of a Rule 12 (c) motion for judgment on the pleadings while the case was still pending before the Superior Court. 618 A.2d at 713. Plaintiff argued that because this defense was not affirmatively set forth in the defendant's answer, it was waived under Rule 8 (c). *Id.* at 714. This Court rejected the plaintiff's waiver argument. It explained that Rule 8 (c) should be interpreted flexibly and, "where an affirmative defense is raised by motion *at the pleading stage*, courts will generally ignore the technical requirements" of Rule 8 (c) if no prejudice results to the opposing party. *Id.* at 715 (emphasis added) (quotation omitted). There is nothing in *Osei-Kuffnor* to suggest that *res judicata* can be raised to make a collateral attack on the final judgment of a separate court.

[7] *See District of Columbia v. Tulin*, 994 A.2d 788, 797 n.10 (D.C. 2010) ("Although we are not required to follow the Restatement, we should generally do so where we are not bound by the previous decisions of this court or by legislative enactment . . . ." (quotation omitted)); *Ellis v.*

(footnote continued on next page . . .)

The Superior Court did not find "manifest error" in the OAH proceedings, and there was none. In *Oubre v. District of Columbia Department of Employment Services*, 630 A.2d 699 (D.C. 1993), this Court held that "where there is a manifest error in the record of the prior proceeding" and "manifest injustice" would otherwise result, the *res judicata* effect of an administrative order may be relaxed. *Id.* at 703-04. Here, however, there was no manifest error in the record as the finding of facts in the Final Order were each consistent with the housing inspection report. *See* Final Order 3 (A21). Moreover, although Ms. Gales now claims that she was unable to attend the OAH proceedings because of her advanced age and illness, the record shows that she had been consulting with legal counsel about the proceedings, *see id.* at 2 (A20). Consequently, even if the Court were to accept the landord's belated representations about her failure to appear before OAH, she could have asked counsel to appear before the OAH on her behalf, just as she did in opposition to Mr. Mitchell's Small Claims Court suit.[8]

In addition to violating the established rule against collateral attacks, the Superior Court's holding—that a litigant who fails to appear at an administrative proceeding can challenge the merits of the final award *post hoc* during the enforcement proceeding—is inconsistent with the adjudicatory scheme established by the Rental Housing Act. Under the Rental Housing Act of 1985, as amended, the OAH, *and not the Superior Court*, has been designated as the appropriate forum to hear tenant petitions in the first instance. *See* D.C. Code §§ 42-3502.04 (c), 2-

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James V. Hurson Assocs., 565 A.2d 615, 618 (D.C. 1989) (holding that adoption of the Restatement's guidance is appropriate "[i]n the absence of any current well-developed doctrine in our jurisdiction").

[8] Ms. Gales failed to argue manifest error below, and, therefore, in addition to being without merit, that argument is not properly presented in this appeal. *See Lasche v. Levin*, 977 A.2d 361, 366 n.4 (D.C. 2009) ("'This court and appellate courts generally, consistently refuse to consider arguments made for the first time on appeal.'" (quoting *Hessey v. Burden*, 615 A.2d 562, 581 (D.C. 1992)).

1831.03 (b-1)(1) (2012). Where a litigant is disappointed with the OAH's decision, he can seek reconsideration from the OAH, *see* OAH Rule 2828, or file an appeal—first with the RHC and later with this Court. *See* D.C. Code §§ 2-1831.16 (b), 42-3502.19 (2012). Allowing the Superior Court to sit in review of the merits of an RACD tenant petition is clearly inconsistent with the method of judicial review established by the D.C. Council when it enacted the Rental Housing Act.

Finally, the Superior Court's holding is bad public policy. By allowing collateral attacks on the final orders of administrative agencies, the Superior Court's rule would significantly undermine the RACD's ability to adjudicate tenant petitions with any degree of finality. Landlords would know that they could simply ignore the RACD proceedings—which are already fraught with delay—and, if things turn out badly, raise any and all arguments against the validity of the award at the enforcement stage.

Accordingly, it was error for the Superior Court to allow Ms. Gales to raise *res judicata* to attack the enforceability of the Final Order and to dismiss Mr. Mitchell's Application for entry of that order as a judgment.[9]

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[9] Even if Ms. Gales had raised *res judicata* during the OAH proceedings, it was by no means certain that she would have prevailed. The party asserting *res judicata* has the burden of proving that the defense is applicable. *Johnson v. District of Columbia Rental Hous. Comm'n*, 642 A.2d 135, 139 (D.C. 1994). Here, the forms of relief that were available in the Small Claims Court and the RACD were fundamentally different. The RACD had jurisdiction to award a comprehensive equitable reduction in rent and a declaration that the notice to vacate was unenforceable, neither of which were available in the Small Claims Court. *See* D.C. Code § 11-1321 (2012) (jurisdiction of Small Claims Court limited to suits "only for the recovery of money" in the amount of $5,000 or less). Moreover, it is not clear that the Small Claims Court exercised jurisdiction over all of Mr. Mitchell's claims. See *infra* note 14. Thus, it was by no means certain that Ms. Gales' *res judicata* defense would have been successful. But, in any event, the question of whether this argument might have had merit is now irrelevant, since it cannot be used to collaterally attack the Final Order.

II. The Mere Possibility of Double Recovery Does Not Permit The Superior Court to Refuse Enforcement on *Res Judicata* Grounds, Especially Where There Are Clearly Established Remedies For Double Recovery.

During the July 25, 2011 hearing, the Superior Court expressed concern that granting the Application would give Mr. Mitchell double recovery for his injuries—once in Small Claims Court and once at the RACD. *See* Pl. Supp. Mem. 2 (8/1/2011). Although the court never used the words "double recovery" in its order dismissing Mr. Mitchell's Application, the possibility of a double recovery did not justify refusing enforcement of the Final Order. This is true for two reasons.

First, as a threshold matter, double recovery is an affirmative defense that was not raised in the OAH and cannot now be used to collaterally attack the validity of the Final Order. *See, e.g., Nizan v. Wells Fargo Bank Minn. N.A.*, 650 S.E.2d 497, 502 (Va. 2007) (characterizing double recovery as a "common law defense"); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 499 (Mo. Ct. App. 1988) (characterizing double recovery as an affirmative defense). Because Ms. Gales never raised this defense during the administrative proceeding, it has merged into the merits of the Final Order and cannot be raised now to challenge its enforceability. *See Domino Media, Inc., supra*, 9 F. Supp. 2d at 388-89 (applying New York law) (holding that the defense of "double recovery" cannot be used to collaterally attack a final judgment; the only grounds for attack are lack of jurisdiction and fraud in the means by which the judgment was procured).[10]

[10] Indeed, for all practical purposes, allowing Ms. Gales to raise a double recovery defense to block enforcement of the Final Order would be no different than allowing her to raise the *res judicata* defense, as the two defenses are closely related. *See Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991) (one purpose of *res judicata* defense is prevention of double recovery).

Second, even supposing that the Superior Court had an equitable power to reform the Final Order on double recovery grounds before entering judgment, this would not justify the Superior Court's refusal to enforce the Final Order entirely. The law allowed Mr. Mitchell to seek relief from housing code violations in both Small Claims Court and the RACD. He was not required to elect one or the other, especially when the Small Claims action could not and did not provide complete relief for the housing code violations that the housing inspector, the Small Claims court, and the OAH all found existed.[11] Instead of making the RACD's award a nullity by refusing to enforce it, the Superior Court could have both reduced the award to a judgment and eliminated any double recovery by simply offsetting that new judgment by an appropriate amount. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 725 n.8 (1980) (noting that double recovery can be eliminated by crediting "awards under one compensation scheme . . . against any recovery under [a] second scheme"); *Pension Benefit Guar. Corp. v. Don's Trucking Co.*, 309 F. Supp. 2d 827, 834 (E.D. Va. 2004) (holding that later judgment be "offset by any actual recovery from [a] prior suit" to prevent double recovery), *aff'd sub nom. Pension Benefit Guar. Corp. v. Beverley*, 404 F.3d 243, 250 (4th Cir. 2005).

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[11] The common law doctrine of election of remedies does not apply here and was, in any event, not asserted before OAH or the Superior Court. As early as 1932, this Court's predecessor explained that this doctrine is "'now largely obsolete.'" *McFadden Sec. Co. v. Stoneleigh Garage, Inc.*, 55 F.2d 1025, 1027, 60 U.S. App. D.C. 400, 402 (1932) (quoting *Friederichsen v. Renard*, 248 U.S. 207, 213 (1918)). And in any event, "[t]he doctrine of election of remedies . . . is not available as a defense unless the defendant has materially changed his position as a consequence of plaintiff's previous conduct." *N. Am. Graphite Corp. v. Allan*, 184 F.2d 387, 389, 87 U.S. App. D.C. 154, 156 (1950). Such was not the case here. Nor was there any statutory basis to require an election of remedies. Unlike the D.C. Human Rights Act, which specifically requires the victim of unlawful discrimination to choose between seeking relief in the Office of Human Rights or in Superior Court, *see* D.C. Code § 2-1403.16 (a) (2012), the Rental Housing Act does not require an election of remedies where a tenant has been provided with substandard housing. *See* D.C. Code title 14, ch. 35 (2012) (lacking any statutory election of remedies requirement).

Here, the traditional offset to the rent reductions would be in the exact amount of the Small Claims judgment for contract damages (*i.e.*, $900). Indeed, this is precisely the approach taken by courts when a jury award results in a plaintiff receiving a double recovery based on alternative theories of liability. This approach has been explained by the United States Court of Appeals for the Tenth Circuit as follows:

> [D]ouble recovery is precluded when alternative theories seeking the same relief are pled and tried together. . . . Where a jury award duplicates damages, the court, either sua sponte or on motion of a party, should reduce the judgment by the amount of the duplication.

Mason v. Okla. Turnpike Auth., 115 F.3d 1442, 1459 (10th Cir. 1997), *rev'd on other grounds, TW Telecom Holdings, Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011).[12] In other words, where enforcing two awards would result in a double recovery, the plaintiff is allowed to keep the larger award. *See Giordano v. Interdonato*, 586 A.2d 714, 717 (D.C. 1991) ("'[W]hen a jury verdict sustains several alternative theories of recovery advanced by a plaintiff, the trial court must . . . render judgment on the theory which affords the *greatest* recovery." (emphasis added)); *Telecom Tech. Servs., Inc. v. Siemens Rolm Commc'ns, Inc.*, No. Civ. A. 1:95-CV-649WB, 2000 WL 35568637, at *5 (N.D. Ga. July 26, 2000) ("Where two recoveries are duplicative, the court will elect the damage award affording the injured party the *greater*

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[12] *See also Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 581 (6th Cir. 1994) ("Where a jury award duplicates damages, 'the court should . . . reduce the judgment by the amount of [the duplication], and thereby prevent double recovery.'" (quoting *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1259-60 (10th Cir. 1988) (alterations in original)); *Mattell, Inc. v. MGA Entert., Inc.*, No. CV 04-9049, 2011 U.S. Dist. LEXIS 85928 (C.D. Cal. Aug. 4, 2011) ("Where . . . duplication is apparent [in a jury verdict], 'the court, either sua sponte or on motion of a party, should reduce the judgment by the amount of the duplication,' and thereby prevent double recovery." (quoting *Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063, 1079 (10th Cir. 2008)).

recovery." (emphasis added)); *Indiana ex rel. Zoeller v. Pastrick*, 696 F. Supp. 2d 970, 982 (N.D. Ind. 2010) ("The damages [that] plaintiffs seek pursuant to [three different statutes] would compensate for the same losses stemming from the same pattern of wrongful conduct. Accordingly, the court will order defendants to pay only the *greatest* of the amounts of damages recoverable under any one of the three statutes; the two lesser amounts would, in this case, simply be duplicative." (emphasis added)); *DSC Commc'n Corp. v. DGI Techs., Inc.*, No. 3:94-CV-1047-X, 1997 U.S. Dist. LEXIS 19068, at *3 (N.D. Tex. Nov. 17, 1997) ("DSC has prevailed on several claims. The Court awards the *greatest* amount of damages . . . on claims based on the same facts and aspects of damages so that in fairness no double recovery is had by DSC due to different theories of recovery." (emphasis added)), *rev'd in part on other grounds*, *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999).[13]

Thus, even if the double recovery argument were not barred as a collateral attack, any possibility of double recovery did not permit the Superior Court to dismiss Mr. Mitchell's Application. Instead, the court should have simply reduced the RACD's award by the dollar amount of any duplication.

[13] Offset is recognized as an appropriate means of preventing double recovery in a variety of contexts. For example, when a person convicted of a crime is ordered to pay restitution, the amount of restitution is offset by the amount of any civil judgments previously paid to the victim to prevent double recovery. *See, e.g., United States v. Louper-Morris*, 682 F.3d 539, 566-67 (8th Cir. 2012); *United States v. Elson*, 577 F.3d 713, 734 (6th Cir. 2009). Similarly, where a plaintiff settles with an alleged tortfeasor, and later obtains a civil judgment against a non-settling defendant, the amount of the judgment is offset *pro tanto* to prevent double recovery. *See Berg v. Footer*, 673 A.2d 1244, 1248-49 (D.C. 1996).

III. Alternatively, The Superior Court Erred by Not, at a Minimum, Entering Judgment on The Portion of The RACD Award That Covered The Reduction in Services After July 15, 2010.

In any event, the Superior Court erred by dismissing the *entirety* of Mr. Mitchell's Application when the Small Claims Court judgment covered only a *portion* of the claims decided by the RACD's Final Order. Mr. Mitchell did not, and could not, present claims to the Small Claims court based on housing code violations tht occurred *after* the Small Claims court entered judgment.

Ongoing housing code violations result in a "partial breach"—as opposed to a total breach—of a rental contract. *See* Restatement (Second) of Contracts § 236, cmt. b ("If the injured party elects to or is required to await the balance of the other party's performance under the contract, his claim is said instead to be one for damages for partial breach."); *see also Twyman v. Johnson*, 655 A.2d 850, 854 (D.C. 1995) (characterizing ongoing housing code violations as a "partial breach" of the implied warranty of habitability). "[I]n the case of a partial breach of contract, the award is limited to damages incurred as of the time of suit, but . . . *subsequent suits may be brought as further damages are incurred, without offending principles of claim preclusion.*" *Boston Edison Co. v. United States*, 658 F.3d 1361, 1366 (Fed. Cir. 2011) (citing Restatement (Second) of Judgments § 26, cmt. g)) (emphasis added). Thus, Mr. Mitchell could have filed two suits or twenty suits to recover damages for the same housing code violations, and received awards covering different time periods (as was the case here). Accordingly, the Superior Court erred, at a minimum, by refusing to enforce the portion of the RACD's Final Order postdating the Small Claims Court's judgment.

In order for *res judicata* to apply, the party asserting the defense must show three things, of which the second is most important here: (1) that the claim was adjudicated finally in the first action; (2) *that the present claim is the same as the claim which was raised or which might have*

been raised in the prior proceeding; and (3) that the party against whom the plea is asserted was a party or in privity with a party in the prior case. *Elwell*, *supra*, 947 A.2d at 1140; *Calomiris*, *supra*, 3 A.3d at 1190.

Before the Superior Court, Ms. Gales erroneously asserted that the claims in the Small Claims Court judgment and the Final Order were "identical" because they were based on the same alleged violations of the housing code and were documented in the same housing inspection report. *See, e.g.*, Mot. to Dismiss ¶ 9 (7/1/2011). This assertion is simply incorrect. Although the claims may be based on the same violations of the housing code, the two awards do not cover the same months and, therefore, they are not "identical."

Specifically, the Final Order awarded Mr. Mitchell a $300 per month retroactive reduction in rent from the beginning of his tenancy through *October 2010*. Final Order 9 (A27). The Small Claims Court decision, however, covered *at most* the period from the beginning of the tenancy through the date of decision, *July 15, 2010.*[14] Thus, the last three months addressed in the Final Order could not have been addressed by the Small Claims Court judgment, and *res judicata* cannot apply to preclude enforcement of this portion of the award. By dismissing his

[14] The exact time period covered by the Small Claims Court judgment is not clear from the record. *See* Small Claims Judgment (A17). One possibility is that the Small Claims Court judgment covered the period from the beginning of Mr. Mitchell's tenancy through the date that he filed his complaint in Small Claims Court (*i.e.*, May 25, 2010). This is the Restatement rule. *See* Restatement (Second) of Judgments § 26, cmt. g & ill. 7 (damages for partial breach limited to those sustained "up to the time of the institution of the action"). Under this rule, the months of June and July 2010 would also not have been included in the Small Claims judgment. A second possibility is that the judgment covered the period up until when the court held an evidentiary hearing on the claims (*i.e.*, July 15, 2010). Or a shorter period might have been covered. The judgment itself does not specify. However, in no event could the Small Claims Court have awarded damages prospectively (*i.e.*, to cover any period after July 15, 2010).

Application in its entirety, the Superior Court completely deprived Mr. Mitchell of his right to recovery for August, September, and October 2010.

CONCLUSION

For the reasons set forth above, the final order of the Superior Court should be reversed and this matter remanded with instructions to grant Appellant's Application for Entry of Administrative Agency's Final Order as Judgment.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief to be delivered by first-class mail, postage prepaid, the 18th day of May, 2012, to

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