SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JQ1 ASSOCIATES, LLC,

Plaintiff,

- against -

SCHWARTZ & ASSOCIATES, C.P.A., PLLC,

Defendant.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 614355/19
Motion Seq. No.: 01
Motion Date: 03/12/2020

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Exhibits	2
Reply Memorandum of Law	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing defendant's affirmative defenses and counterclaims. Defendant opposes the motion.

In support of the motion, counsel for plaintiff submits, in pertinent part, that, "[a]fter being sued for breach of a commercial lease and money damages only, defendant, Schwartz & Associates, CPA, PLLC ('Schwartz & Associates'), a former tenant of an office building located in Jericho, New York, has alleged a panoply of sixteen affirmative defenses and counterclaims, none of which can survive the motion to dismiss. The genesis of this litigation is the daily presence in the building of a large golden retriever named Theodora, who is owned by Marvin

Schwartz ('Marvin') and his son, Gregory Schwartz ('Gregory'). Despite a plain and unambiguous lease provision excluding animals or pets of any kind, which Marvin and Gregory complied with for twenty-eight (28) years, they continue to bring the dog into the building. Schwartz & Associates' lease restriction preventing the presence of animals is no different than the rules and regulations applied by plaintiff, JQ1 Associates, LLC ('JQ1 Associates'), to all of the other buildings' tenants. Schwartz & Associates justify Theodora's presence on the ground that she is as (*sic*) service dog that assists Marvin and Gregory in coping with their psychological stresses. Further, to apply the no animal prohibition to Theodora is an act of disability discrimination in public accommodations. Unfortunately, for defendant and Marvin and Gregory, this argument has already been rejected a total of four (4) times in administrative and judicial proceedings. After an investigation resulting from a complaint Marvin filed on behalf of himself and his son claiming disability discrimination in public accommodations, the New York State Division of Human Rights ('DHR') issued a Determination and Order dated February 19, 2019, which dismissed the charges and closed the file. DHR's order was affirmed by this Court on August 15, 2019. Schwartz & Associates was not content with DHR's ruling, or willing to comply with their express contractual obligations, and responded to JQ1 Associates' service of a lease default notice and intention to file a holdover proceeding, by commencing another action in this Court that sought to enjoin JQ1 from enforcing the lease's no pet prohibition and evicting them. In a decision and order dated May 30, 2019, Justice Sher denied Schwartz & Associates' motion for a '*Yellowstone*' injunction and dismissed the complaint. The dismissal was expressly based on DHR's prior investigation and adjudication of Marvin and Gregory's disability claims. Schwartz & Associates also lost a motion to reargue the denial of the '*Yellowstone*' injunction and dismissal of the action. Now, despite four adverse rulings and determinations by a state administrative agency and this Court, Schwartz & Associates rehashes the same disability accommodation claims and presents them as both affirmative defenses and counterclaims. The second and fifth affirmative defenses and first counterclaim allege direct violations of the

Americans with Disabilities Act of 1990, § et seq., 42 U.S.C.A. § 12101, et seq. ('ADA'), the federal counterpart to the New York State Human Rights Law, NY Executive Law, § 290, et seq. ('NYSHRL'), while several others claim the failure to permit the presence of Theodora breached the lease agreement (i.e., the first, third, sixth and seventh affirmative defenses, and fourth, fifth and sixth counterclaims). Schwartz & Associates, as a professional limited liability company, does not have the capacity to assert a direct claim for disability discrimination under the ADA. Only individual persons have the right to make such a charge. Lack of capacity aside, and regardless of how they are styled, all of Schwartz & Associates' affirmative defenses and counterclaims that rely on the ADA and NYSHRL are barred by the doctrines of res judicata and collateral estoppel. The same claims were raised by Marvin and Gregory before the DHR and disposed of after the administrative agency investigated. Thereafter, the DHR's determination was affirmed not once, by three times by this Court. The viability of the affirmative defenses and counterclaims that alleging JQ1 Associates' decision to bar Theodora constitutes a breach of the lease, is also undermined by other principles of law. For instance, JQ1 Associates did not breach the covenant of quiet enjoyment as a matter of law. Given that Schwartz & Associates, by bringing Theodora to the leasehold and violating Section D, Paragraph 17 of the building's Rules and Regulations, failed to perform all its' tenants obligations, which is a condition precedent to insisting upon the landlord's compliance with the covenant of quiet enjoyment. Similarly, JQ1 Associates could not violate the lease agreement's covenant of good faith and fair dealing, since the claim is duplicative of Schwartz & Associates' breach of contract complaint. All the remaining affirmative defenses and counterclaims are deficient as a matter of law, such as the catch-all affirmative defenses grounded in principles of equity – i.e., unclean hands, waiver, estoppel, laches and ratification (fourth and nineth affirmative defenses). Equity-based defenses are not applicable here because JQ1 Associates' only seeks damages at law for breach of contract. Likewise, New York State does not recognize harassment (the third counterclaim) as a common law tort. Finally, the cause of action for nuisance (the seventh counterclaim) is infirmed

because it does not allege that JQ1 Associates committed an intentional act that substantially interfered with Schwartz and Associates' use and enjoyment of its' office space. The landlord merely insisted Marvin and Gregory comply with the terms of their lease, which bars the presence of animals and has been in existence for nearly thirty years. Thus, all of Schwartz & Associates' defenses and counterclaims are subject to dismissal." *See* Plaintiff's Affirmation in Support Exhibits A-H.

Counsel for plaintiff further asserts, in pertinent part, that, " JQ1 Associates, a commercial landlord and owner of an office building located at 100 Jericho Quadrangle, Jericho, New York 11753 (the 'Building'), commenced this post-holdover action against Schwartz & Associates, an accounting firm that formerly occupied space in the building. The action only seeks legal remedies. Specifically, contractual damages for unpaid rent and additional rent; holdover rent; interest and late charges; repairs for damages to the leasehold; and attorneys' fees.... Schwartz & Associates responded to the Complaint by filing an Amended Answer with nine affirmative defenses and seven counterclaims.... The nine affirmative defenses allege: 1) JQ1 Associates wrongfully terminated the lease; 2) defendant has a legal right to bring Theodora, a service animal, into the Building; 3) plaintiff breached the lease's covenant of quiet enjoyment; 4) JQ1 Associates' claims are barred by the doctrine of unclean hands; 5) plaintiff violated the ADA by prohibiting the dog access to the Building; 6) JQ1 Associates breached the lease's covenant of good faith and fair dealing; 7) plaintiff is not entitled to recover for its own negligent and improper behavior; 8) the Complaint fails to state a cause of action; and 9) JQ1 Associates' cause of action is barred by the equitable doctrines of waiver, estoppel, laches and ratification.... Schwartz & Associates' claim monetary damages under seven counterclaims (the 'Counterclaims') for the following: 1) violations of the ADA; 2) assault; 3) harassment; 4) breach of the lease; 5) breach of the lease's covenant of quiet enjoyment; 6) breach of the lease's covenant of good faith and fair dealing; and 7) nuisance.... Prior to the filing of this

motion, Schwartz & Associates stipulated to the withdrawal of the second counterclaim for assault." *See* Plaintiff's Affirmation in Support Exhibits A and B.

Counsel for plaintiff also contends, in pertinent part, that, "Schwartz & Associates, a professional limited liability company, lacks the capacity to bring a claim for disability discrimination in the enjoyment of any place of public accommodation, which complaint can only be filed by an individual person.... A company is not an individual and cannot suffer from a physical or mental impairment, which finding is the *sine qua non* of liability under the anti-discrimination law.... Put simply, the frivolous counterclaim is barred by Schwartz & Associates' lack of capacity to sue.... Even if Schwartz & Associates possessed the capability to sue, res judicata requires the dismissal of the first counterclaim because the disability discrimination claims predicated on JQ1 Associates' refusal to permit Marvin & Gregory to bring Theodora into the building have already been rejected a total of four (4) times by administrative and judicial tribunals.... Under the doctrine of res judicata, a disposition on the merits bars litigation 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 was either raised or could have been raised in the prior proceeding. [citations omitted].... The fact that the prior litigation was resolved through the application of the NYSHRL, as opposed to the ADA, is of no moment. 'New York disability discrimination claims are governed by the same legal standards as federal ADA claims.' [citations omitted]. Thus, the first counterclaim is barred as a matter of law, since Marvin, Gregory and Schwartz & Associates commenced and had adjudicated adversely to them one administrative proceeding and two plenary lawsuits (not including both the rehashed administrative charge and lawsuit recently filed by Gregory) premised on the identical complaints interposed in the first counterclaim." *See* Plaintiff's Affirmation in Support Exhibits B and D-G.

Counsel for plaintiff additionally argues, in pertinent part, that, "[s]imilar in nature to res judicata, the related equitable doctrine of collateral estoppel requires the dismissal of several

of Schwartz & Associates' affirmative defenses and counterclaims, including: first affirmative defense (JQ1 Associates wrongfully terminated the lease); second affirmative defense (Schwartz & Associates were legally permitted to bring Theodora in the building); third affirmative defense (plaintiff breached the lease's covenant of quiet enjoyment); fifth affirmative defense (JQ1 Associates violated the ADA); sixth affirmative defense (plaintiff breached the lease's covenant of good faith and fair dealing[)]; fourth counterclaim (JQ1 Associates' (*sic*) breached the lease); fifth counterclaim (plaintiff breached the lease's covenant of quiet enjoyment[)]; and sixth counterclaim (JQ1 Associates breached the lease's covenant of good faith and fair dealing). All of Schwartz and Associates' just mentioned affirmative defenses and counterclaims rely on the same claim, to wit: that JQ1 Associates (*sic*) decision to enforce its lease regulation prohibiting the presence of dogs in the Building is illegal under the ADA and NYSHRL. Since this position has already been rejected four times, it, therefore, cannot serve as the basis for the affirmative defenses and counterclaims. 'The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes 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 or those in privity, whether or not the tribunals or causes of action are the same.' [citations omitted].... Even in the absence of collateral estoppel, Schwartz & Associates' fifth counterclaim (breach of covenant of quiet enjoyment) and sixth counterclaim (breach of covenant of good faith and fair dealing) fail to state cognizable claims.... While Schwartz & Associates' three remaining affirmative defenses and two counterclaims are not dependent on violations of the ADA or NYSHRL, dismissal is appropriate nonetheless, because they are defective as a matter of law. The fourth affirmative doctrine (*sic*) raises the equitable doctrine of unclean hands, which 'applies when the offending party is guilty of immoral unconscionable conduct directly related to the subject matter in litigation and which conduct injured the party seeking to invoke the doctrine.' [citation omitted]. Schwartz and Associates cannot invoke the doctrine in defense of JQ1 Associates' breach of contract claim because JQ1 Associates only demands a money judgment and no equitable relief.

[citations omitted]. Likewise, Schwartz & Associates' ninth affirmative defense, a catch-all of the remaining universe of equitable defenses – waiver, estoppel and laches – is inapplicable to the present dispute…. Finally, the seventh affirmative defense, while not a paragon of clarity, seems to imply a comparative fault defense – i.e., plaintiff is barred from recovery by 'its own negligent, intentional, improper behavior.' As with Schwartz & Associates' other affirmative defenses, this one is also misapplied. The rules of comparative fault and contributory negligence only apply to claims seeking damages for personal injury, injury to property or wrongful death. [citation omitted]. These defenses do not apply to breach of contract causes of action. Dismissal of the third counterclaim is mandatory, given that New York does not recognize harassment as a common law cause of action. [citations omitted]…. The sole remaining cause of action – the seventh counterclaim for nuisance – is also subject to dismissal for failure to state a claim." *See id.*

In opposition to the motion, counsel for defendant asserts, in pertinent part, that the "Landlord seeks to have the affirmative defenses and counterclaims dismissed purportedly because 'this argument has already been rejected a total of four (4) times in administrative and judicial proceedings'. While some of the facts alleged are similar the affirmative defenses and counterclaims are properly asserted in this proceeding and in accordance with the law and should certainly not be dismissed at this stage of the proceedings. Plaintiff fails to mention the eviction proceeding it commenced wherein the defendant filed and (*sic*) answer and counterclaims … raising the same issues interposed herein. The defendant was forced to vacate the premises, given the hostility they (*sic*) faced on a daily basis, hence, the landlord-tenant proceeding they filed in Nassau District Court, …, was resolved via Stipulation of Settlement dated 9-26-2019…. Defendant surrendered possession of the leasehold and, as part of that settlement, 'both parties reserve all rights to pursue in the appropriate forum any claims or causes of action that they may have against one another that arise under the terms and conditions of the lease'. As such, Schwartz & Associates is absolutely entitled to interpose the affirmative defenses and

counterclaims filed herein. Furthermore, Schwartz and Associates has never had these the (*sic*) issues heard or adjudicated whatsoever by any Court or administrative body. The argument essentially being made by plaintiff is that because Marvin Schwartz, CPA ('Marvin') filed complaints with the New York State Division of Human Rights ('DHR') which issued a Determination and Order dated February 19, 2019 that the affirmative defenses and counterclaims being interposed by the corporate defendant should be dismissed. Depriving this corporate defendant the right to have its affirmative defenses and counterclaims properly adjudicated based upon the prior decisions involving Mr. Schwartz, in his personal capacity, is not legally sound. In its simplest terms they are not interchangeable.... '[T]he affirmative defenses and counterclaims interposed by Schwartz and Associates in this lawsuit are clearly not identical to those filed by Marvin and have been properly asserted by the (former) corporate tenant. It was the defendant who was in privity of contract with the plaintiff and owed its employees certain duties and responsibilities which the plaintiff interfered with. Furthermore, discrimination and wrongful conduct against the defendant (and its employees) continued past the date Marvin filed his complaint, to wit; July 30, 2018. 'Continuing wrongs' are an exception to res judicata even if it were applicable to the instant case and involved the same parties. Hence, not all of the defendants (*sic*) claims had accrued at the time the complaint by Marvin was filed; [citations omitted]. The defendant has *never* had its allegations and complaints examined and determined and the specific allegations contained in the present complaint are not contained in the prior complaint filed by Marvin and the discriminatory conduct engaged in by the landlord. The plaintiff further argues to this court that Gregory Schwartz ('Gregory'), an employee of Schwartz and Associates and the son of Marvin, has also had these claims address (*sic*) and resolved in the prior proceeding notwithstanding the fact that he never filed a complaint or was addressed in any decision thereof. To be sure, Gregory has filed a complaint with the Nassau County Human Rights Commission, which is currently pending,..." *See* Defendant's Affirmation in Opposition Exhibits A-C.

Counsel for defendant further contends, in pertinent part, that, "Schwartz and Associates has simply **never** had the affirmative defenses and counterclaims asserted herein adjudicated whatsoever. Plaintiff argues that the defendants (*sic*) equitable defense of the equitable doctrine of unclean hands is defective because it is only seeking money damages, [citation omitted]. This argument is disingenuous because the damages being sought are based upon, and stem from, an eviction proceeding which is clearly equitable in nature. The plaintiff cannot force out a 35-year tenant then sue for money damages without being called to account for the underlying equitable proceeding it commenced to do so. Given the foregoing, and the evidence presented, Schwartz & Associates can certainly raise an issue concerning the 'immoral unconscionable conduct directly related to the subject matter in litigation and which injured the party seeking to invoke the doctrine, [citation omitted]. Contrary to plaintiffs' (*sic*) assertions, defendants (*sic*) first counterclaim for violation of Titles II and III of the Americans With Disabilities Act ('ADA') is valid and properly interposed.... It is undisputed that the principal of Schwartz & Associates, Marvin Schwartz, CPA, is disabled. Likewise, his son, Gregory Schwartz, and (*sic*) employee of Schwartz & Associates is also disabled. Furthermore, given their disabilities, a service animal was properly and legally prescribed to treat and assist in their disabilities. As such, the plaintiff had a legal obligation under the ADA to accommodate Schwartz and Associates, Marvin and Gregory (an employee thereof) in connection with their service animal, Theodora. The plaintiff makes it quite clear it did not permit the defendant, as an employer, to accommodate this employee.... Plaintiff not only failed to accommodate a legally disabled tenant but actively and repeatedly discriminated against them as outlined herein. As such, the first counterclaim for violation of the ADA should not be dismissed. The breach of the covenant of quiet enjoyment involves an interference with possession of the premises by a landlord or persons under the landlords'(*sic*) control. The covenant of quiet enjoyment indicates the landlord will not do anything to disturb the tenants (*sic*) right to use their rented space peacefully and reasonably – and the landlord will act in a way that allows that peaceful use. As explicitly set forth herein, the

plaintiff most certainly violated the defendants (*sic*) covenant of quiet enjoyment to use its office space peacefully. Plaintiff harassed and intentionally, vindictively and maliciously interfered with the defendants' (*sic*) quiet enjoyment of the Premises. Plaintiff, though its agents and employees, engaged in a course of conduct which annoyed, threatened, intimidated, alarmed, and put Marvin and Gregory, as well as defendants (*sic*) employees, in fear of their safety. Defendants (*sic*) breach of contract counterclaim is properly interposed and is one of the primary issues in this case which the court needs to adjudicate.... The parties certainly entered into a contract, the lease, and defendant performed hereon for 35 years paying rent monthly without fail until the plaintiff refused to accept it. The plaintiff proceeded to interfere with the rights of Schwartz and Associates ultimately forcing them out of the building and the defendant incurred substantial damage sand (*sic*) legal fees as a direct result thereof. Defendant is entitled to have this matter adjudicated, on the facts and the law, by this Honorable Court.... Good faith and fair dealing on the part of the plaintiff herein is (*sic*) certainly in (*sic*) issue given the facts and allegations pled herein which, as a matter of law, must be assumed accurate.... It is clear that plaintiff's actions were (i) substantial, (ii) intentional, (iii) unreasonable, (iv) interfered with defendants' (*sic*) leasehold right to use and enjoy the Premise and (v) were caused by the plaintiff. As such, Schwartz and Associates (*sic*) counterclaim for nuisance should not be dismissed at this preliminary stage of the proceedings."

In reply to the opposition, counsel for plaintiff asserts, in pertinent part, that, "Schwartz and Associates does not directly dispute that as a professional limited liability company it lacks the capacity to bring a disability discrimination claim in the enjoyment of any place of public accommodation, which claim can only be filed by an individual person. Instead, without citation to any authority, either federal or state, Schwartz and Associates takes the irrational and incomprehensible position that JQ1 Associates' legal efforts to enforce the lease's no pet close (*sic*), which prohibition Schwartz and Associates complied with for nearly three decades, prevented Schwartz and Associates from accommodating an employee's – Gregory- disability....

No such claim is recognized under either the ADA or corresponding New York State human rights legislation. Even if Schwartz and Associates direct ADA claims were to be considered on the merits, they must be dismissed because the underlying supposition – that JQ1 Associates must reasonably accommodate Marvin and Gregory's alleged disabilities by permitting them to keep a service dog on the premises – has been considered by both the DHR and this Court several times and been rejected. As such, the doctrines of res judicata, collateral estoppel and privity bar the affirmative defense and counterclaims. Not only do these prior rulings bar any direct ADA causes of action, but they also preclude any indirect claims premised on charges of discrimination, such as Schwartz and Associates (*sic*) fourth (breach of contract), fifth (breach of the covenant of quiet enjoyment) and sixth (breach of the covenant of good faith and fair dealing) counterclaims. Put simply, JQ1 Associates' enforcement of its no pet prohibition was not discriminatory, JQ1 Associates' (*sic*) did not breach the lease."

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONS LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially

unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010).

A claim may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the opposing party's factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *See Carter v. Walt Whitman New York City Housing Authority (NYCHA)*, 98 A.D.3d 1113, 951 N.Y.S.2d 210 (2d Dept. 2012). The fundamental principle underlying the doctrine of *res judicata* is that in the public interest, a party may not be heard a second time on an issue that has once been called upon and contested. *See New York State Labor Relations Board v. Holland Laundry*, 294 N.Y. 480 (1945). The rationale for the doctrine of *res judicata* is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again. *See In re Hunter*, 4 N.Y.3d 260, 794 N.Y.S.2d 286 (2005); *Kalter v. Riversource Life Ins. Co. of New York*, 142 A.D.3d 1141, 38 N.Y.S.3d 71 (2d Dept. 2016); *Lyons v. Lancer Ins. Co.*, 142 A.D.3d 689, 36 N.Y.S.3d 889 (2d Dept. 2016). Allowing re-litigation would undermine public policy concerns

intended to ensure finality, prevent vexatious litigation, and promote judicial economy. *See Spencer v. Spencer*, 159 A.D.3d 174, 71 N.Y.S.3d 154 (2d Dept. 2018).

It is settled that "[t]he party seeking the protection 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." *River View at Patchogue, LLC v. Hudson Ins. Co.*, 122 A.D.3d 824, 998 N.Y.S.2d 55 (2d Dept. 2014). *See also Buechel v. Bain*, 97 N.Y.2d 295, 740 N.Y.S.2d 252 (2001); *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 563 N.Y.S.2d 24 (1990); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823 (1984); *Curley v. Bon Aire Properties, Inc.*, 124 A.D.3d 820, 2 N.Y.S.3d 571(2d Dept. 2015). The issue must have been material to the proceeding and essential to the decision rendered therein. *See Ryan v. New York Tel. Co.*, *supra* at 501. "[P]reclusive effect, however, will only be given where the particular issue was actually litigated, squarely addressed and specifically decided" *(Ross v. Medical Liab. Mut. Ins. Co.*, 75 N.Y.2d 825, 552 N.Y.S.2d 559 (1990); *M.V.B. Collision, Inc. v. Rovt*, 101 A.D.3d 830, 956 N.Y.S.2d 90 (2d Dept. 2012)), meaning that the issue "must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding." *Matter of Halyalkar v. Board of Regents of State of N.Y.*, 72 N.Y.2d 261, 532 N.Y.S.2d 85 (1988). *See also D'Arata v. New York Cent. Mut. Fire Ins. Co.*, *supra* at 667; *Carrasco v. Weissman*, 120 A.D.3d 531, 992 N.Y.S.2d 36 (2d Dept. 2014)."The party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, *supra* at 664; *Abrahams v. Commonwealth Land Title Ins. Co.*, 120 A.D.3d 1165, 992 N.Y.S.2d 537 (2d Dept. 2014).

Collateral estoppel is a fundamentally equitable doctrine which is not to be rigidly or mechanically applied. *See Auqui v. Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246, 980 N.Y.S.2d 345 (2013); *Jeffreys v. Griffin*, 1 N.Y.3d 34, 769 N.Y.S.2d 184 (2003); *Buechel v. Bain*, *supra* at 304–305. Rather, its application in a particular case turns on "general notions of fairness involving a practical inquiry into the realities of the litigation." *Auqui v. Seven Thirty One Ltd. Partnership*, *supra* at 255; *Buechel v. Bain*, *supra* at 304–305; *Egbert Square Realty, LLC v. 112-114 Corp.*, 93 A.D.3d 687, 940 N.Y.S.2d 291 (2d Dept. 2012). Courts have discretion in deciding whether to apply the doctrine of collateral estoppel (*see Matter of Russo v. Irwin*, 49 A.D.3d 1039, 854 N.Y.S.2d 240 (3d Dept. 2008)), and upon "rendering a determination... in the interest of fairness," "[d]oubts should be resolved against imposing preclusion." *Buechel v. Bain*, *supra* at 305; *State v. Zurich American Ins. Co.*, 106 A.D.3d 1222, 965 N.Y.S.2d 206 (3d Dept. 2013).

While the doctrine of *res judicata* has been treated as a branch of the law of estoppel, and these terms have been used interchangeably to describe the effect of former proceedings as precluding further litigation of particular facts and issues or of particular causes of action, it is generally accepted that the principle of estoppel is distinguishable from the doctrine of *res judicata*. *Res judicata* and collateral estoppel are related doctrines that are designed to limit or preclude re-litigation of matters that have already been determined; *"res judicata"* generally precludes re-litigation of claims, while "collateral estoppel" precludes re-litigation of issues. Thus, "collateral estoppel," or "issue preclusion," is a component of the broader doctrine of *res judicata* and provides that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and

questions of law necessarily decided therein in any subsequent actions. *See Highlands Center, LLC v. Home Depot, U.S.A., Inc.*, 149 A.D.3d 919, 53 N.Y.S.3d 321 (2d Dept. 2017).

Based upon the arguments presented to the Court, and the four (4) subsequent decisions rendered by the New York State Division of Human Rights and this Court, the Court finds that *res judicata* bars defendant's first counterclaim, and that defendant's first affirmative defense, second affirmative defense, third affirmative defense, fifth affirmative defense, sixth affirmative defense, fourth counterclaim, fifth counterclaim and sixth counterclaim require dismissal based upon the doctrine of collateral estoppel.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), 'the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiffs can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiffs can

ultimately establish the truth of their allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Verified Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, *supra* at 88.

When viewing defendant's counterclaims in light of the criteria set forth above, the Court finds that defendant has failed to state valid causes of action in its third, fifth, sixth and seventh counterclaims.

CPLR § 3211(b) states that a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

The standard by which a motion to dismiss a defense is decided is whether the defendant actually has a defense, not whether they have actually stated one. On a motion to dismiss affirmative defenses, the moving plaintiff bears the burden of demonstrating that the defenses are without merit, as a matter of law, either because the defense does not apply under the factual circumstances of the case or because it fails to state a defense. Once the plaintiff meets this burden, the defendant has the burden of rebutting that conclusion through something more than conclusory affidavits or hearsay evidence. *See Coyle v. Lefkowitz*, 89 A.D.3d 1054, 934

N.Y.S.2d 216 (2d Dept. 2011); *Greco v. Christoffersen*, 70 A.D.3d 769, 896 N.Y.S.2d 363 (2d Dept. 2010).

In the instant matter, the Court finds that defendant's fourth, seventh, eighth and nineth affirmative defenses are without merit, as a matter of law. Counsel for defendant's arguments in opposition fail to rebut this finding.

Therefore, based upon all of the above, plaintiff's motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing defendant's affirmative defenses and counterclaims, is hereby **GRANTED in its entirety**.

It is further ordered that a Preliminary Conference is scheduled to be held on November 9, 2020, by the filing of a Proposed Preliminary Conference Order.

The parties are hereby directed to the court website:

(http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml)

where they will find a fillable PC form with instructions on how to fill it out and when and how to return it. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTERED
Sep 28 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 24, 2020