UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 08-22679-CIV-GOLD/MCALILEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

HIALEAH HOUSING AUTHORITY,

Defendant.
_____/

ORDER DENYING IN PART MOTION TO DISMISS; REFERRING PARTIES TO MEDIATION

This CAUSE is before the Court on Defendant Hialeah Housing Authority's ("HHA") Motion to Dismiss [DE 7]. A Response [DE 11] and Reply [DE 14] have been filed, and oral argument on the Motion was held on February 27, 2009. I having carefully reviewed the Motion, the case file, and relevant law. For the following reasons, the Motion to Dismiss is denied in part and the parties are ordered to mediation.

I. Background

The facts as alleged in the Complaint, taken as true for the purposes of resolving a Motion to Dismiss, are as follows:

Miguel Rodriguez and his family formerly resided at a multi-family apartment complex located at 6329 W. 24th Street, Hialeah Florida (the "subject property"), which was managed and operated by HHA, a Department of Housing and Urban Development ("HUD") funded housing provider that manages several public housing developments throughout Hialeah, Florida. Rodriguez is disabled and has physical impairments that substantially limit his ability to climb stairs, and further receives Social Security disability

insurance ("SSDI") benefits. His physical impairment was caused by a workplace injury in 2001.

On or about December 2004, disputes arose at the subject property between the Rodriguez family and another resident family. On or about January 3, 2005, HHA served the Rodriguez family with a Notice of Lease Termination due to their conflict. Thereafter, on or about January 20, 2005, Rodriguez and his wife, Lazara, attended an informal HHA internal grievance hearing to dispute the lease termination, where they advised HHA that Rodriguez needed to live in a unit with bathroom facilities accessible without climbing stairs. The Rodriguez family was offered a transfer to a vacant unit at Hoffman Gardens, another public housing development operated by HHA, which HHA represented had a half-bath on the first floor. A day later, Lazara Rodriguez informed HHA that the transfer was not acceptable because the Hoffman Gardens unit did not in fact have any bathrooms on the first floor. On January 24, 2005, HHA issued a decision upholding the termination of Rodriguez's lease. A week later, an attorney for the Rodriguez family sent a letter to HHA requesting a formal hearing; neither the Rodriguez family of their attorney received notice of the hearing, which was held in their absence on March 9, 2005. On March 11, 2005, HHA sent the Rodriguez family a letter upholding the decision to terminate their lease for failure to attend the formal hearing.

On May 4, 2005, HHA filed a complaint for eviction against the Rodriguez family in the County Court for Miami-Dade County, Florida (the "State Action"). On May 17, 2005, Rodriguez filed an answer and motion to dismiss the complaint, alleging that HHA had failed to provide reasonable accommodation for Rodriguez's disability. On June 30, 2005, Rodriguez and his wife participated in court-ordered mediation with HHA, at which the offer

of transfer to Hoffman Gardens was again rejected because the available unit did not have a bathroom that was accessible without climbing stairs. HHA offered to place the Rodriguez family on a waiting list for an accessible unit but insisted that the Rodriguez family would have to vacate their present unit. According to Plaintiff, because of HHA's refusal to provide Rodriguez with an accessible unit, Rodriguez signed a Stipulation and Order of Dismissal dated June 30, 2005 that gave his family until August 31, 2005 to vacate the subject property.[1]

On or about June 2006, Rodriguez filed a complaint with HUD alleging that HHA discriminated against him by denying his request for reasonable accommodation. On August 6, 2008, pursuant to 42 U.S.C. § 36109(g)(2)(A), HUD issued a Determination of Reasonable Cause and Charge of Discrimination (the "HUD Charge"), which concluded that reasonable cause existed to believe that HHA had engaged in illegal discriminatory housing practices because of Rodriguez's disability. Thereafter, HUD authorized the Attorney General to commence the present civil action. Based on the HUD Charge, Plaintiff alleges HHA has violated 42 U.S.C. § 3604(f)(3)(B) of the Fair Housing Act by failing to provide Rodriguez with a reasonable accommodation. Plaintiff seeks monetary damages and injunctive and declaratory relief.[2]

II. Standard of Review

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[1] At oral argument, counsel for Plaintiff clarified that during the mediation session, the Rodriguez family became very frustrated with HHA's refusal to provide them with an accessible unit, and decided to voluntarily vacate so that they would not be terminated for cause.

[2] Defendant argues that Plaintiff has failed to make a showing that it is entitled to injunctive and declaratory relief. I do not reach this question because the consideration of whether remedies sought by Plaintiff are appropriate is premature at this point.

A. Motion to Dismiss

In determining whether to grant a motion to dismiss, the court must accept all the factual allegations in the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff. *Hoffend v. Villa*, 261 F.3d 1148, 1150 (11th Cir. 2001). Where a motion to dismiss is not an adjudication on the merits, a judge may make factual findings. *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008). For instance, it is well-established that a judge may make factual findings necessary to motions to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, ineffective service of process, and improper venue. *Id.* It is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop the record. *See id.*

As for pleading requirements, "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1959, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). However, while a plaintiff need not state in detail the facts upon which he bases his claim, Fed. R. Civ. P. 8(a)(2) "still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 n.3 (2007). In other words, a plaintiff's pleading obligation requires "more than labels and conclusions." *Id.* at 1964-65; *see also Pafumi v. Davidson*, No. 05-61679-CIV, 2007 WL 1729969, at *2

(S.D. Fla. June 14, 2007). The previous standard that there be "no set of facts" before a motion to dismiss is granted has thus been abrogated in favor of the requirement that a pleading must be "plausible on its face." *Bell Atl.*, 127 S. Ct. at 1968, 1974 (in order to survive a motion to dismiss, the Plaintiff must have "nudged [its] claims across the line from conceivable to plausible."). While Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because it strikes a savvy judge that actual proof of those facts is improbable, the factual allegations must be enough to raise a right to relief above the speculative level." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (citing *Bell Atl.*, 127 S. Ct. at 1965) (internal quotations omitted)).

B. Extrinsic Evidence

Both parties in this case have included extrinsic evidence in their pleadings. In the Motion to Dismiss, Defendant attaches three documents relating to the State Action commenced against Rodriguez in Miami-Dade County Court on May 6 , 2005: the Complaint for Eviction and Summary Removal of Tenant [DE 7-2], Rodriguez's Answer, Affirmative Defenses and Motion to Dismiss (the "Answer") [DE 7-3], and the Stipulation and Order of Dismissal dated June 30, 2005 (the "Stipulation") [DE 7-4] (together, the "State Action documents"). Plaintiff attaches to its Response to the Motion to Dismiss, among other documents, the Answer [DE 11-8] and Stipulation [DE 11-10], and the HUD Charge [DE 11-2]. As an initial matter, I first review whether it is appropriate, for the purpose of resolving a motion to dismiss, to consider any of the extrinsic evidence offered by the parties.

The Federal Rules of Civil Procedure provide that "[i]f, on a motion under Rule 12(b)(6)...matters outside the pleadings are presented to and not excluded by the court,

the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). However, under limited circumstances, extrinsic evidence can be taken into consideration without the need for such conversion. In the Eleventh Circuit, Rule 12(b)(6) decisions have adopted the "incorporation by reference" doctrine, under which a document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (internal citations omitted). To be undisputed, the authenticity of the document must not be challenged. *Id.* (internal citations omitted).

As for additional factual assertions provided in a response to a motion to dismiss, as Plaintiff has done here, courts in this Circuit have indicated that pleadings and attached exhibits may be taken into consideration in evaluating a motion to dismiss. *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006) ("When considering a motion to dismiss, all facts set forth in the plaintiff's complaint are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.") (quotation marks and internal citations omitted); *Anthony Sterling, M.D. v. Provident Life and Acc. Ins. Co.*, 519 F. Supp. 2d 1195, 1208 (M.D. Fla. 2007) (same). *But see Knights Armament Co. v. Optical Systems Technology, Inc.*, 568 F. Supp. 2d 1369, 1378 n.7 (M.D. Fla. 2008) (additional information provided in response to motion to dismiss cannot be considered).[3] Further, document "need not be physically attached to a pleading

[3] Courts outside Florida have differed as to the extent to which such information can be taken into consideration without converting the motion to one for summary judgment.

to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, [the court] may consider such a document provided it meets the centrality requirement imposed in *Horsley*." *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). In view of the case law in this Circuit, I conclude that documents attached to a plaintiff's response to a motion to dismiss may be taken into consideration without conversion to a motion for summary judgment, provided they are central to plaintiff's claims and undisputed. Accordingly, under this framework, for the purpose of evaluating this Motion, I take into consideration the State Action documents, which are referenced in the Complaint and attached by both parties to their respective pleadings, and the HUD Charge, which is similarly referenced in the Complaint, undisputed, and forms the basis for the present action against Defendant.[4]

Compare Antoine v. U.S. Bank Nat'l Ass'n, 547 F. Supp. 2d 30, 39 n.4 (D.D.C. 2008) (In a motion to dismiss, the district court would not consider exhibits attached to plaintiff's response the motion, since those exhibits constituted extrinsic evidence); *WellnX Life Sciences, Inc. v. Iovate Health Sciences Research Inc.*, 516 F. Supp. 2d 270, 279 (S.D.N.Y. 2007) (district court cannot consider affidavits and exhibits, or rely on factual allegations contained in legal briefs or memoranda, in ruling on a motion to dismiss for failure to state claim); *Oei v. N. Star Capital Acquisitions, LLC*, 486 F. Supp. 2d 1089, 1102 (C.D. Cal. 2006) (same) *with Bryant v. Gardner*, 545 F. Supp. 2d 791, 801 (N.D. Ill. 2008) (additional factual assertions made in response to motion to dismiss taken into account as long as they do not conflict with complaint); *Vila v. Inter-American Investment, Corp.*, 536 F. Supp. 2d 41, 46 n.5 (D.D.C. 2008) (consideration of e-mails attached as exhibits to plaintiff's response to motion to dismiss for failure to state claim did not require conversion to motion for summary judgment, since plaintiff had extensively referenced and quoted e-mails, not only in his opposition papers but also in his complaint, in support of his claims); *Pedrraza v. Coca-Cola Co.*, 456 F. Supp. 2d 1262, 1264-65 (N.D. Ga. 2006) (on motion to dismiss for failure to state claim, district court may reference documents attached to motion, and responses thereto, but only where attached document is central to plaintiff's claim and is undisputed in the sense that its authenticity is not challenged).

[4] I do not pass judgment on whether the other exhibits attached to Plaintiff's Response would be taken into consideration because they are not presently material to my disposition of this Motion. These attachments include additional documents related to the

III. Discussion

Defendant argues that dismissal of Plaintiff's claims is required on three grounds: (1) that this Court lacks subject matter jurisdiction; (2) this suit is barred by res judicata and collateral estoppel; and (3) the failure to state a claim upon which relief can be granted. I discuss each in turn, and conclude that I have subject matter jurisdiction, this action is not barred by the affirmative defenses of res judicata or collateral estoppel, and that prior to determining whether Plaintiff has adequately stated a cause of action, the parties shall mediate their dispute.

A. Subject matter jurisdiction

As a threshold matter, Defendant contends that this Court has no subject matter jurisdiction, on the basis that Plaintiff's extended delay in bringing this action is unduly prejudicial to Defendant. Defendant contends that 42 U.S.C. § 3610(g)(1), which sets out the time frame within which HUD should make a reasonable cause determination as to whether discriminatory housing practice has occurred, is a jurisdictional one. 42 U.S.C. § 3610(g)(1) provides:

> The Secretary [of HUD] shall, within 100 days after the filing of the complaint..., determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so....If the Secretary is unable to make the determination within 100 days after the filing of the complaint..., the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

Specifically, Defendant argues that HUD did not issue a determination of reasonable cause

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State Action and HUD reasonable cause determination that were not referenced in the Complaint and various correspondence and notices exchanged between Rodriguez and HHA in 2005.

and charge of discrimination until over two years after Rodriguez filed his complaint with HUD, and that an extended delay beyond the 100-day time frame caused substantial prejudice to Defendant and is basis for dismissal for lack of subject matter jurisdiction.

The weight of authority, as examined by the court in *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1054-55 (M.D. Fla. 1995), indicates that the 100-day period of section 3610 is neither a jurisdictional bar nor a statute of limitations. *See, e.g.*, *Baumgardner v. HUD*, 960 F.2d 572, 578 (6th Cir.1992) (procedural shortcomings alone are not a sufficient basis for dismissal); *United States v. Beethoven Assocs. Ltd. P'ship*, 843 F. Supp. 1257, 1264 (N.D. Ill. 1994) ("[t]here is nothing in the language of section 3610 that can fairly be construed as imposing a jurisdictional limit"); *United States v. Curlee*, 792 F. Supp. 699, 700 (C.D. Cal. 1992) ("[t]o read the 100-day provision as a time bar would be to cut off the enforcement powers of the United States and complainants' rights, contrary to the purposes of the Fair Housing Amendments Act of 1988"); *U.S. v. Scott*, 788 F. Supp. 1555, 1558 (D. Kan. 1992) (language of section 3610 excusing noncompliance with 100-day deadline when complying with the statutory deadline is "impracticable" indicates that Congress did not intend to make the 100-day statutory period mandatory). In these cases, the various courts concluded that neither the language nor the intent of section 3610 would render the failure of HUD to issue a reasonable cause determination within 100 days to be a jurisdictional bar to subsequent civil actions. In line with these authorities, and as conceded by counsel for Defendant at oral argument, I conclude any procedural shortcomings by HUD in this case are not a sufficient basis for jurisdictional dismissal of this action.

Defendant cites to one case in support of its position, *U.S. v. Aspen Square Management Co., Inc.*, 817 F. Supp. 707 (N.D. Ill. 1993) (subsequently vacated by consent of parties to permit entry of settlement agreement). In that case, the court held that it lacked subject matter jurisdiction over an action brought by the United States under the FHA due to the United States' failure to render a reasonable cause determination within 100 days after the plaintiff's complaint was filed *or* notify the plaintiff why it could not meet the 100-day time limitation. *Id.* at 710. In the case before me, however, while HUD failed to issue its determination within 100 days, there is no contention that HUD also failed to provide the statutorily required notification to Rodriguez and HHA. Therefore, the holding in *Aspen*, which is premised on the United States' non-compliance with 42 U.S.C. § 3610(g)(1), is inapplicable here. In light of the distinguishable circumstances in this case and the weight of authority in disagreement with *Aspen*, Defendant's reliance on *Aspen* is unavailing.

Although section 3610 does not operate as a jurisdictional bar or statute of limitation, courts have held that dismissal may be appropriate where HUD's inaction causes substantial prejudice to the defendant. *Baumgardner*, 960 F.2d at 578 (recognizing that a short period of time for notice was important after an alleged violation so that parties concerned proceed promptly to negotiate or conciliate with events fresh in the minds of witnesses); *see U.S. v. Forest Dale, Inc.*, 818 F. Supp. 954, 966 (N.D. Tex.1993) (no substantial prejudice caused by a delay of one year and seven months). Defendant claims that it has suffered prejudice because by the time the Complaint was filed, Defendant had already leased out the Rodriguez family's former unit, and because HHA documents may

have been lost or misplaced and their witnesses' memories have likely faded. At oral argument, however, Plaintiff confirmed that it is not seeking the return of the Rodriguez family to the subject property as part of its relief. Further, counsel for Defendant could not articulate with specificity the documents or witnesses on which its defense would rely, and conceded that in view of no substantial prejudice has been caused by the delay in the issuance of the HUD Charge. Accordingly, absent guiding precedent in the Eleventh Circuit Court of Appeals, I conclude that under these circumstances, this Court has subject matter jurisdiction.

B. Res judicata and Collateral Estoppel

Defendant raises the affirmative defenses of res judicata and collateral estoppel. *See* Fed. R. Civ. P. 8(c)(1), contending that the stipulated dismissal and settlement of the State Action bars this present action. The existence of an affirmative defense will generally not support a motion to dismiss unless the defense clearly appears on the face of the complaint. *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir.1984), en banc reh'g, 764 F.2d 1400 (11th Cir. 1985) (per curiam) (reinstating panel opinion). As an initial matter, I conclude that the existence of Defendant's affirmative defenses of res judicata and collateral estoppel clearly appear in the Complaint, where the Complaint states that Rodriguez filed an answer and motion to dismiss HHA's complaint for eviction alleging HHA failed to provide a reasonable accommodation for Rodriguez's disability. [DE 1, ¶ 19]. *See, e.g.*, *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1982) (party may raise affirmative defense of res judicata by 12(b)(6) motion when defense's existence may be judged on face of complaint). Further, because the State Action documents, including the Stipulation, have been received into the record, I have an adequate basis to

determine if res judicata and collateral estoppel warrant a dismissal of this Complaint. *See id.* (dismissal on res judicata grounds permitted where record of the prior case is received in evidence); *In re Managed Care Litigation*, 2008 WL 3850826, *1 (S.D. Fla., Aug. 14, 2008) (granting motion to dismiss on res judicata grounds); *Universal Imports, Inc. v. Federal Exp. Corp.*, 2008 WL 2952843, *2 (M.D. Fla. 2008) (denying motion to dismiss on res judicata grounds); *Fye v. Broadspire Services, Inc.*, 2007 WL 4557152 (S.D. Fla. 2007, Dec. 20, 2007) (same).

1. Res judicata

When we are "asked to give res judicata effect to a state court judgment, [we] must apply the res judicata principles of the law of the state whose decision is set up as a bar to further litigation." *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1509 (11th Cir. 1985) (quotation omitted). Under Florida law, which applies in determining the preclusive effect of a Florida state action on a federal action in this District, a final judgment issued by a court of competent jurisdiction bars "a subsequent suit between the same parties based upon the same cause of action." *Gordon v. Gordon*, 59 So.2d 40, 44 (Fla. 1952). The test for determining whether causes of action share an identity, such that the doctrine of res judicata is invoked, is whether the facts essential to the maintenance of both actions are the same. *Id.* When the doctrine applies, it bars from subsequent litigation all claims that were raised or could have been raised in the first cause of action. *See id.*; *Jang v. United Technologies Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000) (res judicata bars relitigation of matters decided in a prior proceeding when four requirements are met: (1) there must be a final judgment on the merits; (2) the decision must be rendered by a court

of competent jurisdiction; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases); *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999).

Plaintiff contests whether there was a final judgment on the merits and whether the same causes of action were involved in both cases. In the Eleventh Circuit, where an action was dismissed based on a settlement agreement, the causes of action on which final judgment was rendered is analyzed in "modified form." When the parties "consent" to the dismissal of a suit "based on a settlement agreement..., the principles of res judicata apply (in a somewhat modified form) to the matters specified in the settlement agreement, rather than the original complaint." *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288 (11th Cir. 2004). "In determining the res judicata effect of an order of dismissal based upon a settlement agreement, [the court] should also attempt to effectuate the parties' intent. The best evidence of that intent is, of course, the settlement agreement itself." *Id.* at 1289; *see also Brown v. One Beacon Ins. Co. Inc.*, 2009 WL 366801, *2 (11th Cir., Feb. 17, 2009) (reaffirming the holding in *Norfolk*); *United States v. Ameritrade Terminals, Inc.*, 177 Fed. App. 855, 857-58 (11th Cir. 2006) (same). Here, in the State Action, the Stipulation that led to the dismissal of the State Action was reached by agreement of the parties. Where the meaning of the agreement between the parties is clear, I cannot go beyond its four corners and look to the pleadings to ascertain the scope of the preclusive effect of the underlying action. *Norfolk*, 371 F.3d at 1290 (citing *Monahan v. Comm'r*, 321 F.3d 1063, 1068 (11th Cir.2003) ("Principles governing general contract law apply to interpret settlement agreements") (quotation marks and citations omitted)).

In the Stipulation [DE 7-4, 11-10], which is clear and unambiguous, Rodriguez agreed to vacate his unit by 5 pm on August 31, 2005 and hand over keys to the unit before that time, pay HHA $954, and pay rent until he vacates the premises; no obligations were imposed on HHA. The sparse details of the Stipulation does not evince the intent of the parties to preclude future claims by Rodriguez. Rodriguez may have chosen to enter into the Stipulation for a variety of reasons unconnected with the strength of his affirmative defenses. Indeed, the Stipulation does not expressly reserve or preclude the right of Rodriguez to sue on any particular claim in the future. Further, the dismissal is without prejudice, which indicates the absence of intent for Rodriguez to waive future claims related to his eviction against HHA.[5] Accordingly, the present action is not barred by res judicata.

2. Collateral estoppel

"When claim preclusion does not apply to bar an entire claim or set of claims, the doctrine of collateral estoppel, or issue preclusion, may still prevent the relitigation of particular issues which were actually litigated and decided in a prior suit." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990). Under Florida law, four elements required for collateral estoppel: (1) identical parties; (2) identical issues, (3) full and fair opportunity to litigate issues and the issues were actually litigated, and (4) the issues were necessary to the prior adjudication. *Agripost, LLC v. Miami-Dade County,* 525 F.3d 1049, 1055 (11th Cir. 2008) (citing to *Dadeland Depot, Inc. V. St. Paul Fire and Marine Ins. Co.,* 945 So. 2d 1216, 1235 (Fla. 2006)). This Court has also noted another

[5] Fla. R. Civ. P. 1.420(a) provides that "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

factor: that the burden of persuasion in the subsequent action was not significantly heavier than in the prior proceeding. *Johnson v. Florida*, 348 F.3d 1334, 1347 (11th Cir. 2003). Although res judicata requires a final judgment, the finality requirement for collateral estoppel is "less stringent." *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1253 (11th Cir. 2006) (citing *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000)).

As with res judicata, the expressed intent of the parties is also the determining factor in whether a consent-based judgment is given collateral estoppel effect. *Norfolk*, 371 F.3d at 1288-89 (relying on *Balbirer v. Austin*, 790 F.2d 1524, 1528 (11th Cir. 1986) ("a consent judgment cannot constitute collateral estoppel unless...the parties intended the consent judgment to operate as a final adjudication of a particular issue.")). For the same reasons that this action is not barred by res judicata, Plaintiff is not barred from litigating the issue of Defendant's alleged failure to provide reasonable accommodation.

C. Failure to State a Claim

The last remaining question is whether Plaintiff has adequately state a cause of action for discriminatory conduct under section 3604(f)(3)(B) of the FHA.[6] A municipality commits discrimination under section 3604(f)(3)(B) of the FHA if it "fails to make reasonable accommodations in rules, policies, practices, or services, that may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). To prevail, plaintiff must show that: (1) he suffers from a handicap

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[6] In 1988, Congress amended the FHA to prohibit discrimination based on handicap and familial status. See Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619 (1988). The FHAA amended 42 U.S.C. § 3604, the primary substantive provision of the FHA, by adding a new subsection (f) that applies only to discrimination against the handicapped.

as defined by 42 U.S.C. § 3602(h); (2) defendants knew, or should have reasonably been expected to know, of plaintiff's handicap; (3) accommodation of the handicap may be necessary to afford plaintiff an equal opportunity to use and enjoy a dwelling; (4) defendants refused to make such accommodation. *Stassis v. Ocean Summit Ass'n, Inc.*, 2008 WL 1776988, *2 (S.D. Fla., Apr. 17, 2008) (citing *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir.1997); *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997). Defendant alleges that Plaintiff has failed to satisfy the first and fourth elements, namely, that Rodriguez has a handicap as defined by 42 U.S.C. § 3602(h) and that HHA refused to make a reasonable accommodation.

Having determined that dismissal with prejudice on the basis of subject matter jurisdiction, res judicata, or collateral estoppel is not warranted, I reserve ruling on the question of whether Plaintiff has stated a cause of action pending mediation of this dispute.[7] At oral argument, the parties agreed that mediation at this stage of litigation may hold prospects for success, in light of Plaintiff's clarification of the relief it seeks in this action.[8] Further, on January 1, 2009, between the time of the alleged discriminatory conduct and my disposition of this Motion, the ADA Amendments Act of 2008 ("ADAAA") came into effect. Pub. L. No. 110-325, 122 Stat 3553 (2008). This Act amends various sections of the ADA and, notably, provides that the term 'substantially limits' as used in the

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[7] Even I were to conclude that Plaintiff has failed to state a claim, dismissal would be without prejudice and Plaintiff would have the opportunity to amend its complaint.

[8] Counsel for Plaintiff represented that Plaintiff is not seeking to return the Rodriguez family to the subject property, and further that the Rodriguez family would be amenable to returning to a comparable and accessible unit within the Section 8 program in allow Defendant to mitigate its potential damages.

definition of disability "be interpreted consistently with the findings and purposes of the [ADAAA]."[9] *Id.* at 3555. The ADAAA sets forth in its findings and purposes that the United States Supreme Court has created an inappropriately high level of limitation necessary to obtain coverage under the ADA and that whether an individual's impairment is a disability under the ADA should not demand extensive analysis.[10] *Id.* at 3554. For present purposes, I do not reach the question of whether the ADAAA is retroactive in its application, but conclude that providing the parties with an opportunity to address the relevance of this recent legislation in the context of mediation is warranted. Should mediation fail, I will proceed to determine whether Plaintiff has stated a cause of action.[11]

IV. Conclusion

Plaintiff's claims are not barred by lack of subject matter jurisdiction or the affirmative defenses of res judicata and collateral estoppel. Further, for reasons stated above, I reserve ruling on the question of whether Plaintiff has stated a cause of action pending mediation of this dispute. Accordingly, it is hereby

ORDERED and ADJUDGED that

1. The Motion to Dismiss [DE 7] is DENIED in part.

2. The parties are REFERRED to mediation before U.S. Magistrate Judge

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[9] The definition of "disability" under the Americans with Disabilities Act ("ADA") is the same as the definition of "handicap" found in the FHA. 42 U.S.C. § 12102.

[10] The parties do not discuss the ADAAA in their pleadings.

[11] In this respect, I note that as discussed above, the HUD Charge attached to Plaintiff's Response to Defendant's Motion to Dismiss would be considered a part of the Complaint because the HUD Charge is central to Plaintiff's claims and undisputed. In the Charge, HUD finds that Rodriguez has "physical limitations that limit his ability to walk and climb stairs" and that he is "not able to work." [DE 11-2, p. 2].

Peter R. Palermo.

3. For purpose of mediation, Plaintiff shall provide Defendant with a definite and detailed statement of relief demanded, including its demand for injunctive relief, and a breakdown of the sums certain sought for each category of monetary damages.

4. Should mediation fail, I will proceed to resolve the outstanding issues remaining in this Motion and request additional briefing as necessary.

DONE and ORDERED in Chambers in Miami, Florida, this 4 day of February, 2009.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
All counsel of record
U.S. Magistrate Judge Chris M. McAliley