

No. 1-11-1549

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAYMOND DEGRAZIA and DONNA)	
DEGRAZIA,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County.
)	
v.)	Nos. 07 L 4338 &
)	06 M1 724739
JOSEPH LEVATO and JOYCE LEVATO,)	(Cons.)
Individually and d/b/a JIMBO'S INC.,)	
)	Honorable
)	Bill Taylor,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *HELD*: Plaintiffs who were granted possession of premises in forcible entry and detainer action were entitled to attorney fees in that action and rent for defendants' use and occupancy of the premises but were not entitled to damages or attorney fees in subsequently filed action against defendants as holdover tenants.
- ¶ 2 This appeal involves an action for damages and attorney fees by plaintiffs, Raymond and Donna DeGrazia, against their former tenants, Joseph and Joyce Levato, which was consolidated with a previously filed action against defendants for possession of premises after the expiration

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of a commercial lease under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2008) (Act)). In the forcible entry and detainer action, an order of possession was entered in favor of plaintiffs on April 9, 2007, and that order was affirmed by the appellate court on October 2, 2008. *DeGrazia v. Levato, et. al*, No. 1-07-1237 (2008) (unpublished order under Supreme Court Rule 23). While that appeal was pending, plaintiffs filed a complaint seeking double rent from defendants as holdover tenants under section 9-202 of the Act, as well as attorney fees, costs and damages. Both parties filed motions for summary judgment, and the trial court entered an order granting defendants' motion and dismissing the matter in its entirety based on its finding that plaintiffs' claims were barred by the doctrine of *res judicata*. On appeal, plaintiffs contend that the trial court erred in granting summary judgment because: (1) their claims for damages and attorney fees were not precluded under the doctrine of *res judicata*; (2) there was no genuine issue of material fact that defendants' holdover tenancy was willful pursuant to section 9-202 of the Illinois Code of Civil Procedure (735 ILCS 5/9-202 (West 2008)), and (3) there was no genuine issue of material fact as to plaintiffs' right to attorney fees. For the reasons set forth below, we reverse the circuit court, in part, and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 Beginning in the early 1990s, plaintiffs leased property, located at 3259 South Princeton Avenue in Chicago, Illinois, to defendants who operated a restaurant and bar called Jimbo's, which was primarily frequented by fans of the Chicago White Sox, who play home games at nearby U.S. Cellular Field. On October 1, 2001, the parties entered into a new written lease

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agreement whereby defendants leased the premises for three years with the option to extend the term of the lease for two years. Defendants exercised the option and were paying plaintiffs \$1,750 a month in rent in the final year of the lease. When the lease expired on September 30, 2006, defendants refused to vacate the premises, and on October 5, 2006, plaintiffs filed a complaint against defendants for possession of the premises pursuant to section 9-102 of the Act. (735 ILCS 5/9-102 (West 2008)). Plaintiffs sought damages in the amount of \$3,500 a month in rent from October 1, 2006 until the date of eviction, as well as attorney fees and costs, pursuant to the terms of the lease. This case was numbered 6 M1 724739 and will be referred to as *DeGrazia I.*

¶ 5 On October 26, 2006, plaintiffs filed a motion for summary judgment, supported by the affidavit of Raymond DeGrazia, who stated that the lease ended on September 30, 2006, and was not extended beyond that date. Plaintiffs requested double the rent for the period of time that defendants held over after the lease expired, as well as possession of the premises. On November 9, 2006, defendants filed an answer and a first amended defense alleging that on or about May 30, 2006, plaintiff, Raymond DeGrazia, verbally notified them that plaintiffs would renew the lease, pending a determination of an increase in rent. Defendants alleged that plaintiffs had no intention of extending the lease and that they relied on this false representation in deciding not to relocate the bar.

¶ 6 On November 29, 2006, plaintiffs filed a motion to strike defendants' first affirmative defense, which the trial court granted on February 2, 2007, without prejudice. On that date, the court also set the defendants' monthly rental for use and occupancy of the premises at \$1,750 per

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month, retroactive to January 2007. On February 16, 2007, defendants filed an amended affirmative defense arguing that they entered into several lease agreements with plaintiffs over the previous 22 years as holdover tenants, and that it was the "custom and practice" to renew lease extensions verbally and then reduce the oral agreement to a writing at a later date. Contrary to the assertion in their previously filed affirmative defense, defendants alleged that Raymond DeGrazia had verbally notified them that the lease was renewed, effective immediately.

¶ 7 On April 9, 2007, the trial court entered an order granting plaintiffs' motion for summary judgment and their motion to strike the defendants' affirmative defenses and awarded plaintiffs possession of the premises. At the end of the hearing, plaintiffs' trial counsel asked the trial court "can we set this matter over for a hearing and [sic] our attorney's fees, damages under the lease, and holdover rent?" In response, the trial court stated, "You can—we can give you a date now, or you can diary it up whenever you're ready to present it, and give counsel notice; either way, whatever you prefer." The trial court's order entered that day stated, "This matter is continued generally for presentation of plaintiffs' petition for attorney's fees and damages."

¶ 8 On April 12, 2007, defendants filed an emergency motion for a stay of judgment pending appeal pursuant to Illinois Supreme Court Rule 304(a). (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)). Defendants' motion also sought a stay of enforcement of the order of possession pursuant to Illinois Supreme Court Rule 305(b). (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)). On April 17, 2007, the trial court granted defendants' motion in part, staying enforcement of the order of possession. The order also required defendants to file a bond appeal in the amount of \$31,500 (18 times the prior monthly rent amount of \$1,750) and to continue to pay plaintiffs \$1,750 per

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month for the use and occupancy of the premises. On May 4, 2007, defendants filed a notice of appeal in *DeGrazia I*. Plaintiffs then filed a motion to dismiss the appeal and dissolve the stay pursuant to Supreme Court Rules 361(h) and 305(h), which the trial court denied.

¶ 9 On October 2, 2008, the appellate court entered an order affirming the trial court's order granting summary judgment in favor of plaintiffs, dismissing defendants' affirmative defense of equitable estoppel, and awarding plaintiffs possession of the property. *See DeGrazia v. Levato, et. al*, No. 1-07-1237 (2008) (unpublished order under Supreme Court Rule 23). On October 20, 2008, defendants' attorney sent a letter to plaintiffs' attorney offering to forego the filing of a petition for leave to appeal with the Illinois Supreme Court in exchange for use of the property until November 30, 2008. Defendants did not file a petition with the supreme court and vacated the premises on November 30, 2008. Plaintiffs subsequently leased the property at a rental rate of \$4,000 per month to a tenant who opened a bar called "Cork & Kerry at the Park."

¶ 10 On April 26, 2007, shortly before defendants filed their appeal in *DeGrazia I*, plaintiffs filed a complaint for breach of lease agreement against defendants in the Law Division of the circuit court of Cook County. Plaintiffs sought damages for defendants' failure to vacate the premises as required by the lease, compensation for physical damage to the premises, attorney fees, and double rent due to the defendants' willfully holding over possession, pursuant to section 9-202 of the Act (735 ILCS 5/9-202 (West 2008)). This case was numbered 8 L 7 1237 and will be referred to as *DeGrazia II*. On July 10, 2007, the trial court granted plaintiffs' motion to consolidate *DeGrazia I* and *II*.

¶ 11 On August 7, 2007, defendants filed a motion pursuant to section 2-619(a)(3) of the

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Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2008)) (Code), seeking a stay of *DeGrazia II* while they pursued their appeal of the order of possession entered in *DeGrazia I*. In that motion defendants asked the court to stay proceedings in *DeGrazia II* because another action, *DeGrazia I*, was pending before the appellate court and involved the same parties for the same cause. Prior to the court ruling on defendants' motion, plaintiffs filed a motion to increase use and occupancy payments pursuant to section 9-201 of the Act (735 ILCS 5/9-201 (West 2008)). The trial court partially granted the defendants' section 2-619(a)(3) motion, staying the proceedings except for plaintiffs' motion to increase use and occupancy payments. On August 27, 2008, after a hearing on plaintiffs' use and occupancy motion, Judge Barbara McDonald denied the motion on the grounds that she had no jurisdiction to award the relief sought.

¶ 12 After the appellate court affirmed the order of possession in *DeGrazia I*, the trial court lifted the stay of proceedings in *DeGrazia II* and required defendants to file an answer. On July 23, 2010, defendants filed a motion for summary judgment and three days later, plaintiffs also filed a motion for summary judgment. In their motion for summary judgment, plaintiffs requested damages in the amount of \$164,450.00, two-thirds of which would be paid to their attorneys pursuant to their October 11, 2007 contingency fee agreement. In addition, in a memorandum in support of their motion for summary judgment, plaintiffs assert that defendants are responsible for their attorney fees, which totaled \$173,350.00 as of the date the summary judgment motion was filed. Plaintiffs now argue that as of the date of this appeal, their attorney fees total \$246,505.69 and continue to accrue. According to a July 26, 2010, declaration filed by Douglas M. Belofsky, one of plaintiffs' attorneys, plaintiffs have paid only \$11,750.00 of the

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attorney fees owed

¶ 13 On April 14, 2011, the Honorable Judge Bill Taylor entered an order denying both parties' summary judgment motions on the issues of holdover tenancy under 735 ILCS 5/9-202 (West 2008), damages, and plaintiffs' attorney fees. On April 28, 2011, plaintiffs filed a motion for reconsideration of that portion of the April 14, 2011 order denying their motion for summary judgment. On May 3, 2011, Judge Taylor entered an order granting defendants' motion for summary judgment on *res judicata* grounds, denying plaintiffs' motion for reconsideration on the grounds that it was moot, and dismissing the matter in its entirety. Plaintiffs filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 Our review of a trial court's grant of summary judgment is *de novo*. *Hartford Fire Insurance Co. v. Everest Indemnity Insurance Co.*, 369 Ill. App. 3d 757, 761 (2006). Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). Where, as here, the parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005).

¶ 16 In this case, the trial court granted summary judgment in favor of defendants because it found that *res judicata* barred plaintiffs' claim for damages and attorney fees. Under the doctrine

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of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action.

Rein v. David A. Noyes & Co., 172 Ill. 2d 325, 334 (1996). *Res judicata* is an equitable doctrine that is designed to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Murneigh v. Gainer*, 177 Ill. 2d 287, 299 (1997). "*Res judicata* promotes judicial economy by preventing repetitive litigation and [additionally] protects parties from being forced to bear the unjust burden of relitigating essentially the same case." *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004). *Res judicata* extends not only to those claims actually decided in the first action, but also to those issues that could have been decided in that action. *Rein*, 172 Ill. 2d at 334-35. In order to invoke the doctrine of *res judicata*, the following elements must be shown: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of causes of action; and (3) an identity of the parties or their privies. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 470 (2008). The party seeking to invoke the defense bears the burden of demonstrating that it applies. *Cload v. West*, 328 Ill. App. 3d 946, 950 (2002).

¶ 17 Illinois courts also adhere, as a matter of public policy, to a rule against the splitting of claims or causes of action. *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill. App. 3d 638, 657 (1989). Under this rule, where a cause of action is in its nature entire and indivisible, a plaintiff cannot divide it in order to maintain separate lawsuits. *Best Coin-Op*, 189 Ill. App. 3d at 657. A plaintiff is not permitted to sue for part of a claim in one action and then sue for the remainder in another action. *Rein*, 172 Ill. 2d at 340. Instead, a plaintiff must assert all the grounds of recovery he or she may have against the defendant arising from a single cause of

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action in one lawsuit. *Handley v. Unarco Industries, Inc.*, 124 Ill. App. 3d 56, 66 (1984). The rule against claim-splitting, which has been described as an aspect of the law of preclusion, is based on the principle that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits. *Rein*, 172 Ill. 2d at 340.

¶ 18 The Illinois Supreme Court has adopted exceptions to the rule against claim-splitting set forth in section 26(1) of the Restatement (Second) of Judgments. (Restatement (Second) of Judgments § 26(1)(1982)); *Hudson*, 228 Ill. 2d at 462. This section provides that the rule against claim-splitting does not apply to bar an independent claim of part of the same cause of action if: (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. Restatement (Second) of Judgments § 26(1)(1982).

¶ 19 On appeal, plaintiffs contend that the trial court erred in granting summary judgment in favor of defendants on their claims for damages and attorney fees on *res judicata* grounds because there was no final judgment entered in *DeGrazia I*. Alternatively, plaintiffs argue that even if the requirements of *res judicata* were met, it should not be applied in this case because: (1) defendants acquiesced to prosecution of *DeGrazia II*, (2) the trial court expressly reserved

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plaintiffs' right to maintain *DeGrazia II*, and (3) they could not obtain relief in *DeGrazia I* because the trial court in the forcible entry and detainer action did not have jurisdiction to award damages or attorney fees.

¶ 20 Before addressing the merits of plaintiffs' arguments, we first address defendants' assertion that plaintiffs have forfeited their arguments on appeal by failing to raise them before the trial court. First, we note that in their reply to defendants' motion for summary judgment, plaintiffs did argue that the doctrine of *res judicata* does not apply here because the trial court in *DeGrazia I* did not have jurisdiction to decide the damages and attorney fees issues. Therefore, we reject defendants' assertion that the jurisdiction issue was not raised before the trial court. As to forfeiture of plaintiffs' other arguments, we note that while it is true that the general rule in Illinois is that errors not raised in the trial court and raised for the first time on appeal are forfeited, it is also well-settled that "the waiver rule is an admonition to the parties and provides no limitation on this court's jurisdiction." *In re Mark W.*, 383 Ill. App. 3d 572, 588 (2008). 'A reviewing court may, in furtherance of its responsibility to provide a just result and to maintain a sound and uniform body of precedent, override considerations of waiver that stem from the adversarial nature of our system.' " *In re Mark W.*, 383 Ill. App. 3d at 588. Therefore, in order to maintain a sound and uniform body of precedent, we decline to apply the waiver doctrine to the question of whether the trial court expressly reserved plaintiff's right to file the second action.

¶ 21 Turning to the merits of the case, we first address plaintiffs' contention that the trial court erred in granting summary judgment on their claim for attorney fees in favor of defendants on *res judicata* grounds. The lease agreement between the parties addressed the issue of attorney fees

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as follows: "Lessee shall pay upon demand all Lessor's reasonable costs, charges and expenses, including fees of attorneys, agents and others retained by Lessor, incurred in enforcing any of the obligations of Lessee under this lease or in any litigation, negotiation, or transaction in which Lessor shall, without Lessor's fault, become involved through or on account of this lease."

Plaintiffs contend that pursuant to this provision, defendants are responsible for the attorney fees they incurred since they filed their forcible entry and detainer action in October 2006 and that because the trial court in *DeGrazia I* continued the matter for the presentation of plaintiffs' damages and attorney fees, no final order was entered on that issue, precluding the trial court from granting summary judgment on *res judicata* grounds.

¶ 22 "A final order is one which 'either terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate branch thereof.' " *Piagentini v. Ford Motor Company*, 387 Ill. App. 3d 887, 893-94 quoting *Hull v. City of Chicago*, 165 Ill. App. 3d 732, 733 (1987). For an order to dispose of a separate branch of a controversy, the bases for recovery of the counts which are dismissed must be different from those which are left standing. *Piagentini*, 387 Ill. App. 3d at 993 (citing *Rice v. Burnley*, 230 Ill. App. 3d 987, 991 (1992)). "This may occur when the grounds for recovery under the various counts arise from different statutes or common law doctrines or when different elements are required to recover under different theories." *Rice*, 230 Ill. App. 3d at 991. When summary judgment disposes of the rights between the parties, either upon the entire controversy or upon some definite and separate part thereof, it is a final order. *Poulos v. Reda*, 165 Ill. App. 3d 793, 822 (1987).

¶ 23 Here, plaintiffs first contend that the trial court's order in *DeGrazia I* may be a final order on the issue of possession of the premises as a "separate branch of the controversy" but does not qualify as a final order on their claims for damages and attorney fees against defendants.

Plaintiffs assert that this is made clear by the fact that, after granting plaintiffs possession of the premises, the trial court continued the matter to permit plaintiffs to present their damages and attorney fee claims. Further, plaintiffs contend that the fact that they chose not to file a petition for damages and attorney fees in *DeGrazia I* but instead filed a separate action in the law division against defendants does not retroactively transform the order of possession into a final order on those issues. Plaintiffs argue that since the trial court did not enter a final order on their damages and attorney fee claims until May 3, 2011, when Judge Taylor dismissed the consolidated action in its entirety, this court should reverse the trial court's finding that *DeGrazia II* was barred on *res judicata* grounds and permit them to proceed on their claims for double rent under section 9-202 of the Act, as well as attorney fees that they accrued in *DeGrazia I* and *DeGrazia II*. We agree with plaintiffs' assertion that their claims for attorney fees in *DeGrazia I* were not barred by *res judicata*.

¶ 24 On April 9, 2007, the trial court in *DeGrazia I* entered an order granting plaintiffs' motion for summary judgment and their motion to strike the defendants' affirmative defenses and awarding plaintiffs possession of the premises. This was a final order on the issue of possession, but did not constitute a final order on the reasonableness of the attorney fees plaintiffs accrued in seeking possession of the premises, since the court expressly granted plaintiffs' request to continue the matter for presentation of plaintiffs' petition for attorney's fees and damages.

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Although plaintiffs clearly could have filed a petition in *DeGrazia I*, seeking a hearing on their attorney fees, because there was no final order on that issue, plaintiffs are not precluded under the doctrine of *res judicata* from raising it in a second action. Therefore, we reverse the trial court's finding that plaintiffs' claim for attorney fees that were accrued in *DeGrazia I* are barred by the doctrine of *res judicata* and remand for a hearing on the reasonableness of those fees.

¶ 25 Next, we address plaintiffs' contention that the trial court erred in finding that their claims for monetary damages was barred by the doctrine of *res judicata* because those claims could not have been brought in *DeGrazia I*. Plaintiffs assert that section 9-106 of the Act provides that a property owner may bring a complaint "stating that such party is entitled to the possession of such premises *** and that the defendant *** unlawfully withholds the possession thereof from him, her or them ***." 735 ILCS 5/9-106 (West 2008). Section 9-106 further provides that "no matters not germane to the distinct purpose of the proceedings shall be introduced by joinder, counterclaim, or otherwise . However, a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent due." Plaintiffs contend that the Illinois supreme court has also recognized that "[a] forcible entry and detainer proceeding is a statutory summary action to adjudicate possession rights and should not be burdened by other matters unrelated to the issue of possession." *People ex rel. Department of Transportation v. Walliser*, 258 Ill. App. 3d 782, 788 (1994). Plaintiffs note that in *Walliser*, the appellate court stated that "[c]laims seeking monetary damages and not possession are not germane to the distinct purposes of a forcible entry and detainer proceeding." *Walliser*, 258 Ill. App. 3d at 788 (1994) (citations omitted). Plaintiffs assert that the only issues germane to the purpose of *DeGrazia I* were the

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ones relating to their right to possession of the premises after September 30, 2006 and therefore, they should not be precluded from bringing a second action seeking monetary damages. We agree, in part.

¶ 26 First, we note that section 9-106 of the Act clearly states that a claim for rent may be joined in a forcible entry and detainer complaint. Further, section 9-201 of the Act permits a party who brings a forcible entry and detainer action to recover use and occupancy charges pending resolution of the claim. 735 ILCS 95/9-201 (West 2008). "Use and occupancy awards are authorized under the Act because '[a] lessor's obligation to pay rent continues as a matter of law, even though the lessee may ultimately establish a right to rescind the lease, vacate the premises, or obtain other relief.' " *Circle Management, LLC, v. Olivier*, 378 Ill. App. 3d 601, 608 (2007) quoting *People ex rel. Department of Transportation v. Cook Development Co.*, 274 Ill. App. 3d 175, 180 (1995). Therefore, plaintiffs are entitled to rent from defendants for the use and occupation of the premises from the date the lease expired, September 30, 2006 until the date they vacated the premises, November 30, 2008. We note that on April 17, 2007, the trial court granted defendants' motion to stay enforcement of the order of possession but required defendants to file an appeal bond in the amount of \$31,500 , equivalent to 18 months of rent at a rate of \$1,750 per month and ordered defendants to continue to pay plaintiffs \$1,750 per month during the pendency of the appeal. As a result, the damages that plaintiffs accrued due to defendants' refusal to vacate the premises after the lease expired, namely monthly rent in the amount of \$1,750, has been paid. Therefore, the issue is, as the trial court found, moot.

¶ 27 We next turn to the issue of whether the trial court erred in granting summary judgment

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in defendants' favor on the issue of plaintiffs' request for double rent pursuant to section 9-202 of the Act (735 ILCS 5/9-202 (West 2008)) and attorney fees accrued in *DeGrazia II*. Section 9-202 provides, in relevant part, as follows:

"If any tenant or any person who is in or comes into possession of any lands, tenements or hereditaments *** wilfully holds over any lands, tenements or hereditaments, after the expiration of his or her term or terms *** the person so holding over, shall, for the time the landlord or rightful owner is so kept out of possession, pay to the person so kept out of possession, or his or her legal representatives, at the rate of double the yearly value of the lands, tenements or hereditaments so detained to be recovered by a civil action." 735 ILCS 5/9-202 (West 2008).

¶ 28 On January 11, 2007, plaintiffs filed a motion for summary judgment in *DeGrazia I*, requesting possession of the premises as well as double rent pursuant to section 9-202 of the Act for the period that defendants withheld possession of the premises. On April 9, 2007, Judge Garber entered an order granting plaintiffs' motion and allowing them to file a petition for attorney fees and damages. On April 13, 2007, defendants filed a motion for a stay of judgment pending appeal. In response, on April 17, 2007, Judge Garber entered an order granting defendants' motion for a stay of the judgment and ordering them to pay plaintiffs rent in the amount of \$1,750. Plaintiffs could have appealed from that order and requested that defendants be ordered to pay double rent. They chose not to do so, and as a result, that order was final as to the issue of rent owed by defendants for use and occupancy of the premises and plaintiffs cannot be heard to complain about it now. Therefore, because there was a final order entered in

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DeGrazia I on the issue of the amount of rent defendants owed plaintiffs while the appeal was pending and there is no issue as to whether the other two requirements of *res judicata* are met, we find that the trial court in *DeGrazia II* did not err in entering summary judgment on those grounds. We also find, therefore, that since plaintiffs' claim for double rent was without merit, they are not entitled to payment of the attorney fees and costs that they incurred in pursuing that claim in *DeGrazia II*.

¶ 29 We next address plaintiffs' assertion that even if their claims for double rent are barred by the rule against claim-splitting, the rule should be relaxed because three exceptions adopted by our supreme court apply in this case. First, defendants argue that it would be inequitable to apply the doctrine of *res judicata* here because defendants acquiesced in plaintiffs' prosecution of *DeGrazia II* by litigating it for three years without objecting on *res judicata* grounds. A defendant's failure to object to claim-splitting amounts to acquiescence. *Piagentini*, 387 Ill. App. 3d at 897. Plaintiffs assert that in *Piagentini*, the appellate court held that the defendant had acquiesced to claim-splitting by failing to mention *res judicata* in its affirmative defenses, then proceeded to respond to discovery, retain experts, attend depositions, and defend the lawsuit for 3½ years before filing a motion for summary judgment on the basis of *res judicata*. *Id.* at 898. The court found that defendant's failure to file a timely objection when plaintiffs refiled their lawsuit constituted an acquiescence and, as such, is an exception to the claim-splitting rule. *Id.* Similarly plaintiffs contend, in this case defendants raised a claim that the damages action was barred by the order of possession after more than three years of litigation and in the meantime answered the complaint, raised affirmative defenses, responded to discovery, took depositions,

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and defended the case without raising a claim-splitting objection. Therefore, plaintiffs argue, as in *Piagentini*, it would be inequitable to permit defendants to raise it now.

¶ 30 We disagree with plaintiffs' contention that defendants acquiesced in plaintiff's prosecution of the damages litigation. On August 7, 2007, three months after plaintiffs filed their complaint in the law division for damages and attorney fees, defendants filed for a motion to stay the proceedings pursuant to section 2-619(a)(3) of the Code on the grounds that a case was already pending between the parties for the same cause in the municipal division. In that motion, defendants asserted that the two lawsuits involved the same parties, the same lease, and the same damages as the law division case. Although it is true that defendants conducted discovery in the damages litigation, they were required to do so after the trial court only partially granted their section 2-619(a)(3) motion and permitted the matter to proceed on the plaintiffs' motion to increase use and occupancy. Therefore, we reject plaintiffs' assertion that the acquiescence exception to the rule against claim-splitting applies here.

¶ 31 Plaintiffs also contend that the second exception to the rule against claim-splitting applies in this case because the order of possession expressly permitted them to bring claims for attorney fees and damages in a separate action. Our supreme court addressed this issue in *Nowak v. St. Rita High School*, 197 Ill. 2d 381 (2001), wherein the court stated that "*res judicata* does not apply to bar an independent claim of part of the same cause of action if the court in the first action expressly reserves the plaintiff's right to maintain the second action or the plaintiff is unable to obtain relief on his claim because of a restriction of the subject-matter jurisdiction of the court in the first action." *Nowak*, 197 Ill. 2d at 392-93.

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¶ 32 Plaintiffs assert that in this case the trial court's order of possession in *DeGrazia I* expressly allows them to file a petition for attorney fees and damages, and therefore, this court should find that the "express reservation" exception applies here. As discussed above, we agree with plaintiffs that the issues of attorney fees and damages for defendants' use and occupancy in *DeGrazia I* were reserved by the trial court when it entered summary judgment in plaintiffs' favor and awarded them possession of the premises. And because the issue of reasonable attorney fees in that case has not yet been addressed by the trial court, we remand for a hearing on that issue. However, shortly after entering the summary judgment order in *DeGrazia I*, the trial court entered an order requiring defendants to pay plaintiffs \$1,750 per month for use and occupancy of the premises during the pendency of the appeal of *DeGrazia I*. Plaintiffs did not appeal that order, which was final and contained no express reservation permitting plaintiffs to subsequently raise the issue of double rent in a separate action.

¶ 33 Plaintiffs next contend that the third equitable exception to the rule against claim-splitting applies due to the restrictions on the trial court's jurisdiction in forcible detainer actions. For support, plaintiffs cite *Newport Condominium Ass'n v. Talman Home Federal Savings & Loan Ass'n of Chicago*, 188 Ill. App. 3d 1054 (1988), in which the appellate court stated that "[i]t is well established that an action for forcible entry and detainer is purely possessory and the immediate right to possession is all that is involved. A court entertaining such an action has limited and special jurisdiction without equitable powers." *Newport*, 188 Ill. App. 3d at 1058. Therefore, the court held that "because the forcible entry and detainer court lacked jurisdiction to resolve disputes as to title, we conclude that the judgment entered by that court is not *res judicata*

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of the foreclosure action which raises title as an issue." *Newport*, 188 Ill. App. 3d at 1058.

¶ 34 Similarly, in this case plaintiffs contend, because the Forcible Entry and Detainer Act grants the trial court limited jurisdiction to determine possession and not other issues, *res judicata* should not be applied to bar their claim for damages and attorney fees. However, the Act as well as the record belie plaintiffs' contention that they could not have sought damages equal to double rent in *DeGrazia I*. First, we note, as addressed above, that section 9-201 of the Act permits a plaintiff to seek fair and reasonable satisfaction for the use and occupancy of the premises by a holdover tenant. Therefore, plaintiffs were permitted to argue before the trial court that \$3,500 was a fair and reasonable amount for defendants to pay for use and occupancy of the premises, particularly in light of their contention that they had a prospective tenant willing to pay \$4,000 per month in rent. And indeed, that is what plaintiffs did. In their motions for summary judgment, plaintiffs expressly asked the court to award them double rents pursuant to section 9-202 of the Act. The trial court decided that \$1,750 per month was reasonable and plaintiffs did not appeal that decision. Therefore, we reject plaintiffs' argument that the restrictions on the trial court's jurisdiction prohibited them from requesting double rent in *DeGrazia I*.

¶ 35 Lastly, defendants argue on appeal that the trial court in *DeGrazia II* erred in denying their motion for summary judgment on their claim for a holdover penalty under section 9-202 of the Code, because there was no genuine issue of material fact as to whether defendants' willfully held over possession of the premises after the lease expired and on their claim for attorney fees, because there was no genuine issue of material fact that defendants were required to pay plaintiffs' reasonable attorney fees under the terms of the lease. Because we find that the trial

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court did not err in finding that defendants' claims for damages and attorney fees in *DeGrazia II* were barred by the doctrine of *res judicata* we need not address those issues. .

¶ 36

CONCLUSION

¶ 37 For the foregoing reasons, we reverse that part of the trial court's order finding that plaintiffs' request for attorney fees accrued in *DeGrazia I* was barred by the doctrine of *res judicata* and affirm the remainder of the trial court order. We thus remand to the trial court for a hearing on the reasonableness of plaintiffs' attorney fees in *DeGrazia I* and instruct the court to exclude consideration of the attorney fees that plaintiffs accrued in *DeGrazia II*.

¶ 38 Reversed in part and remanded.