No. 15-CV-146

DISTRICT OF COLUMBIA COURT OF APPEALS

TURQUOISE WYLIE,

Appellant

v.

GLENNCREST,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT

OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

BRIEF OF APPELLANT

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RULE 28(a)(2)(A) STATEMENT

The parties to the case are appellant Turquoise Wylie, the defendant below, and appellee Glenncrest, the plaintiff below. In the Superior Court, Ms. Wylie was *pro se*. She is represented in this court by Rachel A. Rintelmann and Jonathan H. Levy, of the Legal Aid Society of the District of Columbia. In the Superior Court, the appellee was represented by Edward Pugh. Appellee is also represented in this court by Mr. Pugh and Mark Raddatz. No intervenors or amici appeared in the Superior Court.

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the trial court erred by failing to vacate a judgment that was void as a matter of law because required notices were not provided to Ms. Wylie.
2. Whether the trial court abused its limited discretion when it denied Ms. Wylie's Motion to Vacate Default Judgment on the basis of an eighty-two-day gap of time between the entry of judgment and the filing of the Motion, despite the reasonable explanation for that gap, the existence of meritorious defenses, and the absence of prejudice to Glenncrest.
3. Whether the trial court violated Ms. Wylie's due process rights when it denied her repeated *pro se* requests to present documentary evidence, her own testimony and the testimony of a material witness who was present in the courtroom, and by relying instead upon unsworn and untrue statements of counsel for Glenncrest.

STATEMENT OF THE CASE

This appeal challenges the denial of Appellant Turquoise Wylie's Motion to Vacate Default Judgment. Appellee Glenncrest filed suit against Ms. Wylie in the Landlord Tenant Branch of D.C. Superior Court, alleging nonpayment of rent and seeking possession of the rental unit leased by Ms. Wylie. Ms. Wylie appeared on the initial hearing date, but did not attend the further initial hearing and was held in default. The case was set for an *ex parte* proof hearing, at which Glenncrest argued that Ms. Wylie was in arrears for unpaid rent and/or utility charges in the amount of $2556.99. A judgment by default was entered after the *ex parte* proof hearing on September 12, 2014 and a writ of restitution was issued thereafter. On September 30, 2014, the writ was executed and Ms. Wylie was evicted. On December 22, 2014, Ms. Wylie filed a Motion to Vacate Default Judgment pursuant to Super. Ct. R. 60(b). On January 8, 2015, the trial court heard and denied Ms. Wylie's

motion, largely on the grounds that there had been an eighty-two-day delay between the execution of the writ of restitution and the filing of the Motion. Ms. Wylie now appeals from that ruling.

STATEMENT OF FACTS

Turquoise Wylie lived in her apartment at 5069 Kimi Gray Court, SE from approximately 2008 until she was evicted on September 30, 2014. She resided in the apartment with her three children, now aged six to sixteen. She was more than seven months pregnant with her youngest child when she was evicted.

In May 2014, Ms. Wylie entered into an agreement with a representative of Glenncrest for the repayment of $603, which was to cover outstanding water bills that had accrued due to a billing error by Glenncrest and to bring her tenant account current. *See* Aplt. App. C at 14:19-15:3; 26:13-26:20; Aplt. App. D. At that time, Ms. Wylie was current in her monthly rent and there was no allegation to the contrary. *Id.* at 26:11, 26:13-26:20. Nonetheless, Glenncrest filed a complaint for possession of the property on June 24, 2014, alleging that Ms. Wylie failed to pay $1,930 in rent due from January 2014 to June 2014 including late fees. *See* Aplt. App. B.[1] Prior to filing the Complaint, Glenncrest did not serve a Notice to Correct or Vacate.

The initial hearing in the case was set for July 25, 2014. *See* Aplt. App. A at No. 3. Both parties appeared at that hearing; Ms. Wylie appeared *pro se*, and Glenncrest appeared through its counsel, Ed Pugh. *Id.* At that hearing, Ms. Wylie discussed the case with Mr. Pugh. Aplt. App. C at 9:20-10:2; 22:11-22:15. Ms. Wylie informed Mr. Pugh that the parties had already entered into a May 22, 2014 out-of-court agreement which she understood to have resolved all outstanding

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[1] Ms. Wylie's rent was only $366 per month because her unit was subsidized and her rent was based on her income. *See* http://www.dchousing.org/doc.aspx?docid=21

claims. *Id.* Ms. Wylie understood from Mr. Pugh that, as long as she caught up on the payments due under the May 22, 2014 agreement, she did not need to reappear in court on August 22, and the matter would be resolved. *Id.* Mr. Pugh denies intending to give Ms. Wylie that understanding. *Id.* at 22:22-22:23.

On August 22, 2014, the date of the further initial hearing, Ms. Wylie did not appear, based on her discussion with Mr. Pugh. *See* Aplt. App. C at 9:20-10:2; 22:11-22:15. Mr. Pugh made an oral request for an order finding Ms. Wylie in default, which was granted. *See* Aplt. App. A at No. 11. The case was scheduled for an *ex parte* proof hearing on September 12, 2014, with the clerk instructed to serve notice to Ms. Wylie. *Id.* Ms. Wylie did not appear at the *ex parte* proof hearing. *Id.* Ms. Wylie later informed the court that she had not received notice of that hearing. Aplt. App. C at 25:6-25:13. At no time did Glenncrest make a formal application for a judgment by default pursuant to Super. Ct. R. Civ 55(b)(2). *See* Aplt. App. A. At no time was notice provided to Ms. Wylie that Glenncrest intended to seek a judgment by default, or that such a judgment could be entered on September 12, 2014 after the *ex parte* proof hearing. *Id.* A notice of *ex parte* proof hearing was generated, but the record does not indicate that it was ever served, and Ms. Wylie testified that she did not receive it. *Id.*; Aplt. App. C at 25:6-25:13. Moreover, that notice gives no indication that a judgment by default could be entered after the hearing. Aplt. App. H.

At the *ex parte* proof hearing, the court heard testimony from Ophelia Johnson, property manager for Glenncrest. Aplt. App. E. Mr. Pugh questioned Ms. Johnson about the lease provisions

which governed the claims in the case. *Id.* at 4:21-5:16 and 6:4-6:20.[2] Specifically, Mr. Pugh referred Ms. Johnson to provisions on both failure to pay rent and failure to pay utilities, which, under the terms of the lease agreement, was to be designated as a failure to pay rent. *Id.* Ms. Johnson testified that Ms. Wylie owed a total of $2556.99. *Id.* It is not clear what portion of that balance, if any, was for rent, and what portion, if any, was for unpaid water bills. *Id.*

After hearing from Glenncrest, the court entered judgment for possession against Ms. Wylie, to be effective upon the filing of a Servicemembers Civil Relief Act Affidavit. *See* Aplt. App. A. The Servicemembers Affidavit was filed on September 16, 2014, and the final judgment for possession was entered by the clerk. *Id.* at No. 17. The Notice to Tenant of Payment Required to Avoid Eviction was filed with the court on September 12, 2014. *Id.* A writ of restitution was filed and approved on September 22, 2014. *Id.* at 18. The writ of restitution was executed on September 30, 2014. *Id.* at 20. It is not clear from the record whether, the writ of restitution was served upon Ms. Wylie. *Id.*

After the writ of restitution was executed, Ms. Wylie was rendered homeless. She visited the Landlord Tenant Resource Center in Superior Court on multiple occasions for assistance in trying to overturn the judgment. Aplt. App. C at 6:4-6:9. Each time, she was told she needed to gather additional documentation prior to filing any motion. *Id.* On December 17, 2014, Ms. Wylie filed a Motion to Vacate Default Judgment, a Motion to Restore her to the premises and an Application to Reduce the Tenant Payment Required to Avoid Eviction. *See* Aplt. App. A at Nos.

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[2] It appears from the transcript of the *Ex Parte* Proof Hearing that the court admitted a lease into evidence, but it was not retained by the court, and counsel for Glenncrest has informed undersigned counsel that he was unable to provide the original exhibit. Aplt. App. E.

25, 27 and 29. Those matters were initially set for hearing on December 22, 2014 but continued to January 8, 2015, for reasons unclear from the record. *Id.*

On January 8, 2015, the court heard argument on Ms. Wylie's Motion to Vacate Default Judgment. *Id.* At no time did the court place any witness under oath. *See generally* Aplt. App. C. Ms. Wylie attempted to introduce documentation from the Landlord Tenant Resource Center, as well as rent receipts to show that she was current in her rent. *See* Aplt. App. C at 6:1-7:8; 30:3-30:18; 18:9-18:11; 20:9-20:12; 28:8-28:9. The court declined to view any of that evidence. *Id.* Ms. Wylie also asked the court to consider testimony from the property manager, who was present in the courtroom, but the court declined to do so. Aplt. App. C at 26:6-26:8. The court directed the hearing, asking close-ended questions of Ms. Wylie and of Mr. Pugh, without giving Ms. Wylie an opportunity to present her own arguments on the Motion. *See generally id.* In rendering its decision, the court relied heavily upon Mr. Pugh's unsworn representations as counsel. *Id.* Ultimately, the court denied Ms. Wylie's Motion, largely on the grounds that it was filed eighty-two days after she was evicted. *Id.*

Though the court did not explicitly address the other motions filed concurrently with the Motion to Vacate, a docket entry from that date indicates that all three motions were denied. *See* Aplt. App. A at No. 44**.** On February 4, 2015, Ms. Wylie filed a timely notice of appeal, seeking review of the denial of her motion to vacate default judgment.

SUMMARY OF THE ARGUMENT

The trial court's decision denying Ms. Wylie's Motion to Vacate Default rests on three separate categories of legal error, each of which merits reversal. The trial court erred in failing to vacate the void judgment; it abused its limited discretion in denying the Motion, largely on the basis that the filing was not prompt; and it denied Ms. Wylie due process by relying upon

statements from counsel for Glenncrest and by failing to allow Ms. Wylie opportunity to present her case. For the reasons set forth below, these violations merit reversal.

First, the court erred in failing to vacate the default judgment pursuant to Super. Ct. Civ. R. 60(b)(4) despite serious procedural defects prior to the entry of the judgment. Specifically, the court failed to determine whether Ms. Wylie had received notice of the *ex parte* proof hearing and, even if she had received such notice, the record is clear that the notice allegedly served did not inform Ms. Wylie that Glenncrest had sought a default judgment as required by Super. Ct. R. 55(b)(2). These failures implicate Ms. Wylie's due process rights, and a violation of due process will render a judgment void. *Hudson v. Shapiro*, 917 A.2d 77, 82 (D.C. 2007); *Evans v. Evans*, 441 A.2d 979, 980 (D.C. 1982). The court has no discretion regarding whether to vacate a default judgment in such cases: a void judgment must be vacated. *Hudson* 917 A.2d at 82; *Jones v. Hersh*, 845 A.2d 541, 545 (D.C. 2004). Because the lack of compliance with Super. Ct. R. 55(b)(2) is clear from the record, this court should reverse the trial court's decision and vacate the default judgment.

Second, even if the judgment was not void pursuant to Super. Ct. R. Civ. 60(b)(4) and therefore not subject to mandatory vacatur, the court abused its discretion in failing to properly evaluate the factors a court is required to evaluate when considering a motion to vacate filed pursuant to one of the other prongs of R. 60(b). *Carrasco v. Thomas D. Walsh, Inc.*, 988 A.2d 471, 474 (D.C. 2010). Specifically, the court erroneously decided that the delay of eighty-two days between the execution of the writ of restitution and the filing of the Motion to Vacate was *per se* unprompt, and failed to grant meaningful consideration to the other required factors. Having decided that the Motion was unprompt, the court failed to meaningfully consider: the reason for the 82-day delay; Ms. Wylie's meritorious – and complete - defenses to the underlying

action; and the fact that she acted in good faith prior to the filing of the Motion. Finally, the court erred in misinterpreting law and fact by finding prejudice to Glenncrest where none existed: specifically, the court determined that the vacatur of the default judgment meant that Glenncrest would be required to evict the tenant who took possession of the premises after Ms. Wylie's eviction, which was simply incorrect. This was an abuse of the trial court's discretion, and warrants reversal.

Finally, the court committed procedural errors which violated court rules and denied Ms. Wylie due process of law. Specifically, the court erred in basing its decision largely on unsworn factual statements made by counsel for Glenncrest, despite the fact that attorneys should not act as both advocate and witness. Rules Of Prof'l Conduct R. 3.7(a)(1), D.C. Ct. Rs. Annot. (Supp. 1991); *S.S. v. D.M.*, 597 A.2d 870, 877 (D.C. 1991). Moreover, the court failed to allow Ms. Wylie to argue her motion, refusing to consider her proffered evidence and limiting her statements to responses to direct, close-ended questions. Due process includes the right to present evidence, a right which Ms. Wylie was denied here. *N.D. McN. V. R.J.H.*, 979 A.2d 1195, 1201 (D.C. 2009).

For these reasons, the court's order denying Ms. Wylie's Motion to Vacate was in error, and should be reversed.

ARGUMENT

I. Standard of Review.

This Court "review[s] the denial of a motion to vacate a default judgment for abuse of discretion, but in view of the 'strong judicial policy' favoring the decision of cases on their merits rather than by default, 'even a slight abuse' of the trial court's discretion is enough to justify reversal." *Carrasco v. Thomas D. Walsh, Inc.*, 988 A.2d 471, 474 (D.C. 2010); *accord*

e.g., Frausto v. United States Dep't of Commerce, 926 A.2d 151, 155 (D.C. 2007); *Chappelle v. Alaska Seaboard Ptnrs., L.P.*, 818 A.2d 972, 973 (D.C. 2003); *Miranda v. Contreras*, 754 A.2d 277, 279 (D.C. 2000). In determining whether the trial court abused its discretion, consideration is given to "'whether the decision maker failed to consider a relevant factor, whether he [or she] relied upon an improper factor, and whether the reasons given reasonably support the conclusion.'" *Puckrein v. Jenkins*, 884 A.2d 46, 60 (D.C. 2005)(quoting *Pinkney v. United States,* 851 A.2d 479, 491 (D.C.2004)).

The only exception to this general standard is in the case of motions filed pursuant to Super. Ct. Civ. R. 60(b)(4): where a party seeks relief from judgment pursuant to Rule 60(b)(4), the trial court has no discretion; if it finds that the judgment is void, it must grant relief. *Hudson v. Shapiro*, 917 A.2d 77, 82 (D.C. 2007). For this reason, "appellate review of the court's decision on a Rule 60 (b)(4) motion is not deferential; it is *de novo*." *Jones v. Hersh*, 845 A.2d 541, 545 (D.C. 2004).

II. The Judgment in this Case was Void, and therefore Vacatur was Mandatory, not Discretionary.

A void judgment must be vacated. Super. Ct. Civ. R. 60(b)(4); *Hudson* 845 A.2d at 82; *Jones* 845 A.2d at 545. Ms. Wylie's motion to vacate the default judgment falls squarely under this Court's decision in *Hudson*, which concerned similar errors by the trial court in considering a potentially void judgment. *Hudson*, 917 A.2d at 82 Indeed, the same two possible due process violations that warranted remand in *Hudson* are present here was well: "(1) the lack of notice of an *ex parte* hearing" and "(2) the trial court's failure to follow its own procedures, set forth in Super. Ct. Civ. R. 55 (b)(2), regarding the application for a default judgment." *Id.* at 83.

Where, as here, a tenant appears in a case and then later defaults, the Civil and Landlord-Tenant Rules of procedure entitle the plaintiff to judgment only after notice to the defendant and a hearing on liability and damages, commonly known as an *ex parte* proof hearing. Super. Ct. R. 55(b)(2), made applicable to proceedings in the Landlord and Tenant Branch by Super. Ct. L&T R. 2, mandates that a party seeking a default judgment apply for such relief and serve written notice of the application for judgment at least three days prior to the hearing on such application. And in the landlord-tenant context, Super. Ct. L&T R. 11(e)(1) adds a separate requirement that once the court enters default and sets an *ex parte* proof hearing, the clerk must send notice to all parties of the hearing date.

Taken together, these rules ensure that a defendant learns of the default, and has the opportunity to contest the plaintiff's allegations, before the court enters judgment against her.[3] Because they concern the basic rights to notice and an opportunity to be heard, the rules implicate a defendant's right to due process. *See Evans*, 441 A.2d at 980 (*citing Grier v. Rowland*, 409 A.2d 205 (1979)) ("[V]iolations of the Superior Court Rules which provide for notice and an opportunity to be heard have the effect of denying a litigant due process of law.") And where the court enters judgment without observing those procedural requirements, the judgment is subject to attack for voidness. *See Hudson*, 917 A.2d at 83.

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[3] This requirement also has the effect of putting the defendant on notice of the default prior to the entry of judgment, which provides her a limited opportunity to request that the default be set aside pursuant to Super. Ct. Civ. R. 55(c). The standard for setting aside the entry of default pursuant to Super. Ct. Civ. R. 55(c) is more lenient than the standard for vacating a default judgment under R. 60(b). *Rest. Equip. & Supply Depot, Inc. v. Gutierrez*, 852 A.2d 951, 956 (D.C. 2004).

In this case, the judgment against Ms. Wylie suffers from two such procedural defects. First, as discussed above, Rule 55 requires that a defendant be notified of a requested default judgment at least three days in advance of the *ex parte* proof hearing, so that the defendant may appear and contest whether the plaintiff is entitled to judgment. But it is undisputed that, in this case, Glenncrest never sent such a notice to Ms. Wylie. Instead, the landlord made an *ex parte* oral request for an order finding Ms. Wylie in default on August 22, 2014, and asked at that time that the court set a hearing so Glenncrest could obtain a judgment.[4] *See* Aplt. App. A at No. 10. Neither Glenncrest nor the court ever sent anything to Ms. Wylie regarding the request for a default judgment, and the only notice generated by the court simply stated that the matter had been set for an *ex parte* proof hearing, without explaining what that meant or informing Ms. Wylie that the hearing could result in a judgment against her. *See generally* Aplt. App. A; Aplt. App. H. *Hudson* mandates reversal for the reason of "the trial court's failure to follow its own procedures, set forth in Super. Ct. Civ. R. 55." *Hudson*, 917 A.2d at 83.

Second, even if the court's notice had complied with the requirements of Super. Ct. R. 55(2)(b), Ms. Wylie testified, without contradiction, that she never actually received notice of the *ex parte* proof hearing, as required by Super. Ct. L&T R. 11(e)(1):

> Ms. Wylie: I didn't get no court date, I did not get no court papers, Judge, for me to come to court September 12th. I got the court papers in the mid-September of whatever they filed in court that day, I got the paper after –
>
> The Court: After they did it.

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[4] A default entered by the Clerk pursuant to Super. Ct. Civ. R. 55 (a) is distinct from a default judgment entered pursuant to Super. Ct. Civ. R. 55 (b)(2) and must be treated separately. *Clark v. Moler*, 418 A.2d at 1042.

> Ms. Wylie: After they did it. I did not get no court paper for me to come to court.

Aplt. App. C at 25:6-25:13. Although the docket suggests that the court mailed her an *ex parte* proof hearing notification, Aplt. App. A at No. 13, the court did not even check the record of the court, and made no other inquiry into the matter, despite Ms. Wylie's testimony that she did not receive it. As in *Hudson*, the trial court made no adverse credibility finding with respect to Ms. Wylie's testimony. *See* 917 A.2d at 83; *see also Chappelle v. Alaska Seaboard Partners, L.P.*, 818 A.2d 972, 974 (D.C. 2003) ("revers[ing] the order denying appellants Rule 60(b) motion" because "nothing in the record before us indicates that appellant was ever notified of the . . . trial date"). Instead, the court essentially ignored her testimony on this point, and did not inquire as to whether the court had properly sent the notice or why Ms. Wylie had not received it. Because these facts were relevant to Ms. Wylie's claim that the judgment should be vacated as void, the court's failure to consider them was error. *See Hudson*, 917 A.2d at 83-84.

As a result of the lack of notice pursuant to Rule 55, and the fact that Ms. Wylie never received what notice the court allegedly did send, Ms. Wylie had no opportunity to appear at the *ex parte* proof hearing and contest the landlord's right to a judgment for possession. Under *Hudson* and *Evans*, these failures implicate Ms. Wylie's due process rights and mandate reversal. *Hudson*, 917 A.2d at 83-84. That is so regardless of other factors cited by the trial court here, including the delay between the discovery of the entry of judgment and the motion to default, and regardless of the existence of meritorious defenses. *Hudson*, 917 A.2d at 83-84. Here, as in *Hudson*, the trial court ignored these procedural violations and "denied the motion to vacate default judgment because Ms. [Wylie] waited too long to file it," which was reversible error. *See also Alexander v. Polinger Co.*, 496 A.2d 267, 269 (D.C. 1985) (Rule 60(b)(4) "places no time limit on an attack upon a void judgment, nor can such a judgment acquire validity because of

laches on the part of him who applies for relief from it."). The trial court has no discretion refuse to vacate a default entered under these circumstances. *Hudson*, 917 A.2d at 82. Accordingly, the decision of the trial court must be reversed.

III. The Trial Court Abused its Limited Discretion in Denying the Motion to Vacate Default Judgment

Setting aside whether the trial court should have vacated the default pursuant to R. 60(b)(4), this court has set forth four factors for the court to evaluate when considering a motion filed pursuant to one of the other prongs of R. 60(b). *Carrasco at 475.* Those factors are whether: (1) the movant had actual notice of the proceeding; (2) he acted in good faith; (3) he presents a prima facie adequate defense; (4) he acted promptly in seeking relief. These factors are weighed against a fifth factor: the potential prejudice to the non-moving party from granting the motion. *Id.* The trial court must consider all of these factors, together with the facts supporting the merits of the Motion itself. *Id.*

Rule 60(b) should be "liberally construed." *Newman v. Universal Enterprises, Inc., 129* A.2d 696, 700 (Mun. Ct. App. D.C. 1957). Courts "should zealously safeguard the right of the citizen to have [the] opportunity to defend himself against suits on claims to which he may have a meritorious defense." *Starling v. Jephunneh Lawrence & Associates*, 495 A.2d 1157, 1160 (D.C. 1985) (*citing Newman, 129 A.2d* at 700). In practice, this means that courts deciding motions to vacate default judgments must place a heavy thumb on the side of the scale favoring vacatur in order to give the parties a chance to have the case heard on the merits:

> [A]ny doubt should be resolved in favor of setting aside the default to the end that a trial on the merits may be had. Where the defaulting party is not guilty of wilful neglect and acts with reasonable diligence after the default has been entered, sound judicial discretion requires setting aside the default if there is a prima facie showing of a meritorious defense and if setting aside

> the default will not prejudice the substantive rights of the opposing party.

Italia Societa Anonima Di Navigazione v. Cavalieri, 99 A.2d 488, 489 (Mun. Ct. App. D.C. 1953).

Here, Ms. Wylie can show more than the "slight abuse" of discretion necessary for reversal. As discussed more fully below, the court held that Ms. Wylie failed to file her Motion to Vacate Default Judgment ("Motion to Vacate") within a reasonable time, despite contrary facts in the record, and despite its refusal to hear further explanation from Ms. Wylie. Based upon its erroneous finding on the "promptness" inquiry, the court apparently decided that a proper inquiry into the remaining factors set forth in *Carrasco*, was unnecessary. 988 A.2d at 475. Further, the court failed to properly analyze the risk of prejudice to the landlord.

A. The Trial Court Erred in Holding that Ms. Wylie's Motion to Vacate was not Promptly Filed, and in Concluding that None of the Other Factors Mattered.

1. Ms. Wylie's motion to vacate the default judgment was promptly filed. The trial court came to the conclusion that Ms. Wylie's Motion to Vacate was not prompt. Aplt. App. C at 25:15 ("…I don't see how you acted promptly."). The court appeared to treat the passage of eighty-two days from the date of eviction until the filing of the Motion to Vacate as *per se* evidence of a lack of promptness and discarded all other legal inquiry. This was an abuse of the discretion because a gap of that length is not, *per se*, proof of lack of promptness. Indeed, significantly longer gaps of time do not automatically render a motion unprompt. *See e.g.*, *Carrasco* 988 A.2d 471 (stating that a delay of one year was not *per se* unreasonable); *Citizens Bldg. & Loan Assoc. v. Shepard*, 289 A.2d 620, 623 (D.C. 1972) (delay exceeding 5 years was not *per se* unreasonable).

2. The court failed to consider the reasons for the eighty-two-day gap. Promptness is not measured solely by the length of the delay, but by whether that delay was reasonable in light of the specific facts of a case. *Carrasco*, 988 A.2d at 476. What "constitutes a reasonable time" in this context "'depends upon the circumstances of each case,' including both the cause and the consequences of the delay." *Id.* The evidence before the court in this case supported the exact opposite of its conclusion: Ms. Wylie's motion was prompt because it was filed within a reasonable amount of time under the circumstances.

Although Ms. Wylie was unrepresented by counsel at the hearing on her Motion to Vacate, she did articulate a reasonable explanation for the delay and sought — unsuccessfully — to testify further and introduce evidence regarding that reasonable explanation. Specifically, Ms. Wylie stated that the delay was a result of her following advice she received from personnel in the Landlord Tenant Resource Center — to which she, like all tenants in Landlord Tenant Court, was referred by the Judge[5] — that she needed to obtain certain information or documentation to file her motion:

> THE COURT: I know the process, we've got people walking in here every day to file motions in emergency to do this, emergency to do that.
>
> MS. WYLIE: Judge, and you're right, and *I could show you all the paperwork from the time I been down to the Resource Center on a daily basis to show you that, and each lawyer, each adviser telling me to make sure I had this, to make sure I had that, and the process was going on and on, time was going on.*

[5] *See* Opening Statement for Landlord-Tenant Court, attached as Aplt. App. G, at 2. ("Both residential landlords and residential tenants may visit the Landlord Tenant Resource Center to receive valuable legal information and help completing forms.")

> THE COURT: Yes, but the thing is, if they weren't representing you in a timely manner, then you had to represent yourself. You still don't have a lawyer.
>
> MS. WYLIE: Yeah, that's true, yeah, and you're right. Believe me, Judge, trust me, I've been trying.
>
> THE COURT: I'm not suggesting you haven't tried, but you waited a mighty long time to tell the court. These people out here in the Resource Center, they don't work long. They're independent people who help –
>
> MS. WYLIE: I didn't even know how to go about telling the court.
>
> THE COURT: They're independent people that help the people, if they did. They don't work for us. You didn't tell anybody in the court until over two months later that they done put you out under these circumstances which you don't think you out to be put out.
>
> MS. WYLIE: I didn't even know about opportunity of the court to even, I didn't know how to even go about doing that. I'm trying to gather up all my information, all my documents, that's what I was told how to start off doing it to make sure I had my proof that I knew that it was wrong for what they did. That's what I was just doing.

Aplt. App. C at 6:1-7:8 (emphasis added). Ms. Wylie explained that she didn't immediately file her Motion to Vacate because she was attempting to gather documents, as she was advised to do by the Resource Center. *Id.* The court, however, did not allow Ms. Wylie to introduce evidence that she informed the court she had with her in support of her argument. *Id.* Later in the hearing, Ms. Wylie again attempted to offer proof of her efforts to seek legal advice, again to be refused by the trial court:

> THE COURT: Well, you claim that you engaged the people downstairs, all you had to do was come in here and file a motion about anything you want.
>
> MS. WYLIE: And it took me this long, it took me that long from December, from October to December, it took me that long for them to let me file these motion papers. *I can show you proof of everything.*

> THE COURT: Well, who let you file?
>
> MS. WYLIE: Down at the Resource Center, I can show you all my papers.
>
> THE COURT: The Resource Center is a help group, they don't dictate what can be filed and what can't, they just help you to do something if you want the help. So no, I'm not going to be able to vacate the default judgment based on what I've heard here today so your request is denied.

Aplt. App. C At 30:3-30:18 (emphasis added). Ms. Wylie thus provided a reasonable basis for the delay in filing her motion. To the extent that the Superior Court found her filing not prompt in light of her reasonable explanation, it abused its limited discretion. To the extent that the Superior Court rejected her reasonable explanation as a factual matter, it doubly erred (and violated Ms. Wylie's due process rights) by failing to make any credibility determination and failing to permit Ms. Wylie to present relevant evidence. See *infra* Part IV.

In effect, the court appears to have decided that Ms. Wylie, a *pro se* party, should have disregarded the advice of the attorneys at the Resource Center and, instead, filed her Motion to Vacate immediately, without first obtaining the documentation and witnesses those attorneys recommended she gather. However, *pro se* litigants should be entitled to rely on the information they receive when they visit the Landlord Tenant Resource Center; although the Center is independent from the court, it is the daily practice of the court to refer litigants to the Center for assistance. If the court refers a tenant to the Resource Center, it should not then fault her for following the advice she received there.

Moreover, the court neither inquired nor gave Ms. Wylie an opportunity to explain what other circumstances may have caused her delay in filing the Motion, despite the fact that it is "the trial court's responsibility to inquire where matters are raised which might entitle the movant to relief under Rule 60(b)." *Miranda v. Contreras*, 754 A.2d 277, 280 (D.C. 2000)(citing

Starling, 495 A.2d at 1162). In order to properly exercise its discretion, "it [is] incumbent upon the court to hear and assess the testimony of [the movant]." *Eaddy v. United States*, 276 A.2d 232, 234 (D.C. 1971).[6]

Where the facts of a particular case show reasonableness and a lack of willful neglect by the moving party, eighty-two days actually is not an overly lengthy delay. This court held, in a matter factually similar to the instant case, that a seven-week delay between the execution of a writ of restitution and the filing of the Motion to Vacate Default was not unreasonable because the tenant asserted that he "experienced emotional and practical difficulties as a result of the eviction, and that he had problems in obtaining counsel." *Westmoreland v. Weaver Bros., Inc.*, 295 A.2d 506, 508 (D.C. 1972). The court wrote that "[i]n view of the relatively short delay and the reasons given for it, the absence of a *finding* that appellant had actual notice or was guilty of willful neglect, and appellant's allegation of a defense which, if proved, would defeat the action against him, we cannot agree that appellant should be denied his day in court because he was dilatory or failed to act with reasonable diligence." *Id.* And in *Carrasco*, this Court held that a delay of a year after eviction did not foreclose a successful motion to vacate default where the

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[6] Had Ms. Wylie been allowed to testify as to the reasons for the delay, rather than having been limited to responses to the court's specific questions, she would have explained that she was nearly eight months pregnant at the time of the eviction and went into early labor in October 2014, soon after she was evicted. Her newborn was hospitalized in the neonatal intensive care unit after his birth. At the same time, Ms. Wylie spent time scrambling to find alternate housing for herself and her three older children, whom she ultimately had to separate and send to live with relatives, all while trying to maintain a fulltime job. Although these facts are not in the record of the trial court, Ms. Wylie should not be penalized for her failure to introduce testimony when the court failed to make required inquiries, limited Ms. Wylie's presentation of her claims to responses to direct questions, repeatedly interrupted her statements, and affirmatively and repeatedly refused to consider evidence proffered by the Ms. Wylie.

basis for that delay was that the tenant "had lost much of his property in the eviction and was homeless; he was living out of his car; his ability to communicate in English was limited; and despite his diligent efforts he was unable to obtain legal assistance." A.2d 471 at 476.

Here, Ms. Wylie's delay in filing her Motion to Vacate after the execution of the writ of restitution was marginally longer than the delay in *Westmoreland* — about eleven weeks, but dramatically shorter than the delay in *Carrasco*. The delay was not unreasonable, given the circumstances: Ms. Wylie stated that she made diligent efforts at securing and following legal advice, and, had she been given the opportunity, she would have testified to other personal circumstances further justifying the delay. There is no allegation of willful neglect by Ms. Wylie, and, as discussed more fully below, she not only has meritorious defenses to the underlying action, she has complete defenses which would defeat this action against her.

As discussed in greater detail below, having erroneously decided that the motion was not prompt, the court essentially ended its inquiry, failing to make proper inquiry into the other three factors. However, it was incumbent upon the trial court to conduct a proper inquiry into all factors behind a party's Motion, not simply whether the Motion was prompt. *Walker v. Smith*, 499 A.2d 446, 449 (D.C. 1985). Anything less than a proper inquiry would "be to too heavily tip the scales in favor of the need for finality in litigation." *Id.* at 449. A complete analysis is critical, as "the failure to balance the need for finality against the right to be heard can lead to grave consequences. The risk is intensified in cases such as this when one of the parties is unrepresented by counsel." *Id*. The court's failure to make meaningful inquiry beyond the question of promptness was an abuse of the court's discretion, and constitutes reversible error. *See, e.g., Carrasco,* 988 A.2d at 475.

B. The Court Failed to Properly Consider Ms. Wylie's Defenses to the Underlying Action.

The court was required to consider whether Ms. Wylie had a prima facie adequate defense to the underlying case. *Carrasco at 475.* Though the court did seem to accept that Ms. Wylie had a defense, it neither analyzed the extent, completeness and nature of that defense, nor weighed it against Ms. Wylie's supposed lack of promptness. *See, e.g., Barr v. Rhea Radin Real Estate, Inc.*, 251 A.2d 634, 635 (D.C. 1969) (holding that defects in the complaint, an inaccurate statement as to the waiver of notice to quit — which would have constituted a complete defense to the action — and a lack of credit for payments made by defendant were all relevant factors that mitigated in favor of vacating a default judgment).

The failure of the trial court to consider meritorious defenses was partially due to lack of diligent inquiry, and partially due to lines of inquiry not pursued because of misrepresentations of counsel for Glenncrest. At the hearing on Ms. Wylie's Motion to Vacate, Mr. Pugh repeatedly and falsely represented that Ms. Wylie's tenancy was not subsidized:

> MR. PUGH: Judge, it's, if I may help.
>
> THE COURT: Sure
>
> MR. PUGH: It's a tax credit property, what happens is, the landlord pays the water bill, the tenant gets a subsidy from the Government to pay the water bill, but the tenant turns around and sends the check to the landlord for the water bill.
>
> MS. WYLIE: I don't get no subsidy, I pay my water bill out-of-pocket. I work, I have a job, I pay my water bill.
>
> MR. PUGH: It was all explained to Judge O'Keefe, the next part [sic] and through.[sic]
>
> MS. WYLIE: Judge, I don't get a subsidy from the Government, I have a job.
>
> THE COURT: Indirectly, it's not a subsidy, it's a direct –

> MR. PUGH: Right.
>
> THE COURT: Well you get some kind of preference or credit or something. You're not doing it just because you don't have nothing better to do.
>
> MR. PUGH: Right.
>
> THE COURT: It's an indirect subsidy. If you're getting a credit on your taxes for something you're running, that's an indirect subsidy as opposed to Section 8 or housing through a voucher, which is a direct subsidy.
>
> MR. PUGH: Right, that's true, I agree, I agree.
>
> THE COURT: They pay it directly to this landlord.
>
> MR. PUGH: I agree, I agree.
>
> THE COURT: You don't get yours until at the end once you do your taxes or whatever you do.
>
> MR. PUGH: Right, right. It's an indirect subsidy.
>
> …
>
> THE COURT: Is this a subsidized unit or not?
>
> MR. PUGH: No, no, indirect subsidy.
>
> THE COURT: Oh, it's a tax credit.
>
> Mr. PUGH: Right.

Aplt. App. C at 15:20-17:20; Aplt. App. C at 18:16-18:19. Based upon these exchanges, the court concluded that the property was subject to a tax credit, but that Ms. Wylie's tenancy was not otherwise subsidized. This understanding may have been further advanced by the Glenncrest's complaint in this action, which indicates that the property is not subsidized. *See* Aplt. App. B at ¶ 4.

This is simply false. Ms. Wylie resided in a privately managed public housing unit, funded by the US Department of Housing and Urban Development ("HUD"), through the District of Columbia Housing Authority ("DCHA"). *See* DCHA, *Development/Hope VI:*

Glenncrest/Triangle View, http://www.dchousing.org/doc.aspx?docid=21 (last visited Jul. 7, 2015. This is a highly material fact because Ms Wylie has defenses in this matter that are only available to her because, contrary to Mr. Pugh's repeated false assertions, her unit was subsidized. The court was presumably aware of this fact, because that is the only logical reason for the court's questioning of Mr. Pugh regarding whether the unit was subsidized. *See generally* Aplt. App. C at 15:20-17:20; Aplt. App. C at 18:16-18:19.

Ms. Wylie has a complete defense to Glenncrest's action here based on the undisputed fact that she did not receive a thirty-day notice to quit prior to commencement of this action for nonpayment of rent. *Moody v. Winchester*, 321 A.2d 562 (D.C. 1974). Glenncrest's sole basis for proceeding in the absence of such a notice was its assertion that Ms. Wylie's lease waived her right to receive such a notice. *See* Aplt. App. B at ¶ 3. But because Ms. Wylie's unit was subsidized, federal regulations governing public housing bar such a waiver , a legal reality of which the court likely would have been aware, had it been on notice that the case involved a subsidized tenancy. S*ee* 24 C.F.R. § 966.4(l)(3)

Ms. Wylie also asserted that she owed no unpaid rent to the landlord. In support of her argument, Ms. Wylie repeatedly attempted to introduce evidence of rent receipts for all of the month allegedly at issue in the complaint. However, the court never reviewed her proffered evidence.

> MS. WYLIE: Want me to show you my rent receipts, Judge of all the months they claim that it's rent, I have rent receipts, I have rent receipts.
>
> …
>
> THE COURT: This says $366, says you didn't pay for January, February, March, April, May and June.
>
> MS. WYLIE: And I got my rent receipts for those months.

> …
>
> MS. WYLIE: I'm being, like I have proof to show, it wasn't even about rent and –
>
> THE COURT: Well, you had the opportunity to go before a judge and have your case heard and this or that, but you didn't avail yourself of the opportunity.

See Aplt. App. C at 18:9-18:11; 20:9-20:12; 28:8-28:9. When Ms. Wylie attempted to explain that she believed some of the balance Glenncrest was suing for had been written off, she implored the court to hear testimony from Glenncrest's representative: "Oh, oh please let her talk because she actually knows about this, she knows about it she really do, she knows about it." Aplt. App. C at 26:6-26:8. But, the court declined Ms. Wylie's request to put on proof in support of her claims.

Ms. Wylie also presented, and the trial court read into the record, an out-of-court agreement of the parties stating that the only balance due from Ms. Wylie to Glenncrest was $603:

> THE COURT: Let me see the agreement. Please note that this matter is settled based on the following. The parties agree that six, what was the date on this thing, on May 22nd, the parties agree that 603.06 will be due and owing through September 2014. Tenant agrees to make four equal payments of $157.60 to become current. Tenant understands that if one single payment is missing, one, or if rent is not paid in full by the 5th day of each month beginning June 24th, the next 12 months, the plaintiff shall be entitled to possession of the unit.

Aplt. App. C at 14:19-15:3; Aplt. App. D. The parties entered into this binding contract for the payment of outstanding monies due and owing a month prior to the filing of the landlord and tenant case. Just as Ms. Wylie agreed to pay $603, so did Glenncrest agree that $603 was owed. Glenncrest was therefore precluded from initiating an action asserting that additional monies

were owed for the time period preceding the entry of the settlement contract. As a matter of public policy, "settlements are encouraged and, like any other type of contract, they are binding on the parties when valid." *Dominique v. District of Columbia Dep't of Employment Services,* 574 A.2d 862, 865 (D.C. 1990). The trial court appeared to cease inquiry into this agreement after counsel for Glenncrest represented — unsworn and without any supporting evidence — that the current suit did not relate to the May 22 agreement:

> MR. PUGH: Judge, I didn't do that agreement, don't take it out on me.
>
> THE COURT: Doesn't matter who did it, you bringing it in here as part of this case.
>
> MR. PUGH: I didn't bring it in here, she brought it in here. This case is six, five months old.
>
> THE COURT: Well, was she supposed to be singing this, did you come to court, plaintiff shall be entitled to possession of the unit based on this, or based on something else?
>
> MR. PUGH: No, Judge, no this was a, no that's an out-of-court agreement done with the property manager who's no longer with the company.
>
> THE COURT: So, you didn't sue based on any of these?
>
> MR. PUGH: No, no.
>
> THE COURT: So, her suit that you have doesn't relate to this?
>
> MR. PUGH: No, Judge, no.
>
> THE COURT: Okay, so he says his suit doesn't have anything to do with this. What's your suit say, for rent? This is different from the water bill.

Aplt. App. C at 17:12-18:8. Mr. Pugh repeatedly represented to the court that the prior agreement was for unpaid water bills, and the current suit was for unrelated unpaid rent. However, there are

two problems with that representation. First, the agreement explicitly stated that it covered monies owed prior to May 2014 and through September 2014 and that if Ms. Wylie made those payments, she would "become current." Aplt. App. D. It makes no mention of the agreement covering only water bills. The landlord tenant case, filed a month later, was for monies owed from January 2014 until June 2014. The record is clear that the same time periods were in fact covered by both the agreement and the landlord and tenant action. Because the agreement provided that Ms. Wylie owed only $603, Glenncrest was precluded by that agreement from later suing her for over $2500. However, the court made no further inquiry, based on counsel for Glenncrest's representation that the agreement did not cover the same matters as the landlord tenant case.

Second, even if it is true that the agreement only covered water bills and therefore had no prejudicial effect as to Glenncrest's claims for rent, the record makes clear that this case actually *was* about water bills. Unfortunately, the trial court hearing Ms. Wylie's Motion to Vacate was unaware if this fact, because of Mr. Pugh's repeated insistence that the case was not about water bills:

> THE COURT: Okay, now this suit says and this is the one you got the judgment on, right?
>
> MS. WYLIE: Um-hum.
>
> MR. PUGH: Yes, Your honor.
>
> THE COURT: This suit says that the defendant failed to pay 1830 for January 14th to June 14th. This doesn't have anything to do with the water bill. This is a straight rent case.

Aplt. App. C at 19:5-19:12. However, these representations are belied by the transcript of proceedings at the September 12, 2014 *Ex Parte* Proof Hearing:

BY MR. PUGH: Q. Now I'm going to flip back over to page 2, specifically paragraph 7. And Paragraph 7 is entitled?

A: "Utilities"

Q. And does it say what happens if you fail to pay utilities?

A. Yes. "Resident shall pay other charges upon notice from the landlord in any amount advanced by the landlord to pay any such utility bills to prevent turn-off or to remove a lien against unit or property by any utility provider, including any late fees, interest, or other related expenses. Failure to pay such amount shall be deemed a failure to pay rent hereunder."

Q. Thank you.

THE COURT: Thank you.

BY MR. PUGH: Q. Now I'm going to show you what I marked as Plaintiff's 2 for identification. Do you recognize this document?

A. Yes. It is the Resident Ledger for Turquoise Wylie.

…

Q. I'm going to flip this right over to the back page which is current up through September the 8th, correct?

A. Correct.

Q. And does it say how much the monthly rent is?

A. Yes.

Q. How much is it?

A. Three hundred and sixty-six dollars per month.

Q. And does it show the water and sewer utility bill in there?

A. Yes, it does.

Q. For each month?

A. Yes, it does.

Q. And what's the total amount due as of today?

A. As of today, the total amount is $2556.99.

Aplt. App. E at 4:21-5:16 and 6:4-6:20. From the record of the *ex parte* proof hearing, it appears that this case did, in fact, include an allegation of nonpayment of water bills. Accordingly, the May 22, 2014 agreement, even if only about water bills, may have precluded Glenncrest from raising some, if not all, of the claims it brought in this case. And even a partial defense here is highly meaningful, as it may have allowed Ms. Wylie to redeem her tenancy by paying a lower amount (assuming she had notice of the judgment).

Mr. Pugh also told the court that that Ms. Wylie received a monthly utility reimbursement to cover the cost of her water bills, which is also inaccurate. Aplt. App. C at 15:20-17:20. Pursuant to the federal law governing public housing, only very low-income tenants who have no rent obligation receive a utility reimbursement. 24 C.F.R. 960.253(c)(3).[7] The fact that Ms. Wylie had a rent obligation is evidence that she was not, in fact, receiving a utility

[7] The Brooke Amendment to the United States Housing Act generally limits the rent that a public housing tenant may pay to 30 percent of adjusted income. *See* 42 U.S.C. § 1437a(a)(1). Implementing regulations refer to this amount as the "total tenant payment." 24 C.F.R. § 5.613. Subtracted from this amount is a utility allowance, in essence a credit for tenants who pay for utilities. Once the utility allowance is subtracted, any remaining amount – referred to as the tenant rent – is paid to the landlord as rent each month. *See* 24 C.F.R. § 960.253. If the utility allowance is greater than the total tenant payment, then the family pays no rent and receives the remaining amount of the utility allowance as a monthly utility reimbursement check. *See id*.

reimbursement.[8] This was also material because, if taken as true, this fact would support an inference that the case must have been about rent, as the utility charges should have been covered by the utility reimbursement. Again, this is false.

Finally, Ms. Wylie asserted facts that would support a defense that Glenncrest's claims were time-barred:

> MS. WYLIE: I have, I don't owe, it wasn't even about my rent, it was past due, it was past due water bills from back in maybe 2000 and, I would say maybe somewhere between 2008 and 2012. I was supposed to have gotten a write-off for that which was a write-off of a $1,400 and something dollars.

Aplt. App. C at 26:13-26:18. The statute of limitations is three years for contract claims in the District of Columbia. D.C. Code § 12-301. If Glenncrest's case was indeed for unpaid water bills or rent dating back as far as Ms. Wylie suggested, it was not legally entitled to a judgment on those claims.

It is clear from the record that the court failed to make proper inquiry into Ms. Wylie's meritorious defenses, but also that Counsel for Glenncrest's affirmative misrepresentations made it impossible for the court to properly consider some of those meritorious defenses. Accordingly, the court's holding cannot survive appellate review.

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[8] Although the *Ex Parte* Proof hearing it is not the subject of the instant appeal, counsel for Glenncrest told the court at that hearing that the government paid appellant $354 per month for utilities, and that, because the utilities cost about $110 per month, "the rest of that money just goes straight into the tenant's pocket." *See* Aplt. App E. This is highly inflammatory and patently false.

C. The Trial Court Failed to Properly Consider Ms. Wylie's Good Faith, Conflating Good Faith with Promptness.

After its erroneous determination that Ms. Wylie's Motion to Vacate was not promptly filed, the trial court also failed to meaningfully consider whether Ms. Wylie proceeded in good faith. *Carrasco,* 988 A.2d at 475. The court's analysis on this point was incomplete, as it failed to hear testimony from Ms. Wylie, apart from her responses to limited inquiries from the court. *See Eaddy,* 276 A.2d at 234; *see generally* Aplt. App. C. Moreover, any finding of lack of good faith on the part of the Ms. Wylie was wholly unsupported by what evidence was on the record.

As discussed more fully in Part III(A), Ms. Wylie had a reasonable explanation for her delay in filing the motion; the delay was caused in part by the fact that she was attempting to gather the documents recommended by the Landlord Tenant Resource Center prior to the filing of her Motion to Vacate. See *supra* Part III(A). Efforts, such as Ms. Wylie's, to seek and follow the advice of legal counsel are evidence of good faith. *Clark v. Moler,* 418 A.2d 1039, 1043 (D.C. 1980) ("Her good faith in attempting to resolve this matter is demonstrated in that upon receiving the complaint and learning of the judgment, she acted as promptly as possible *in trying to find an attorney who would represent her*) (emphasis added).

There was no showing anywhere in the record that Ms. Wylie's delay was caused by bad faith or willful neglect, as defined by this court. *See, e.g., Westmoreland,* 295 A.2d at 508 (holding that "[w]here the defaulting party is not guilty of willful neglect and acts with reasonable diligence after the default has been entered, sound judicial discretion requires setting aside the default if there is a prima facie showing of a meritorious defense and if setting aside the default will not prejudice the substantive rights of the opposing party."). Absent such a finding, it is unclear upon what basis the court made its determination that Ms. Wylie's good faith in

filing her Motion to Vacate was "questionable." *See* Aplt. App. C at 27:12-27:13. Again, it appears that the court determined that an eighty-two day delay in filing was *per se* unreasonable and conclusive evidence of a lack of good faith, despite evidence of Ms. Wylie's diligence in seeking and following legal advice. See *supra* Part III(A). However, this conclusion is supported by neither law nor the record.

The court's failure to fully consider Ms. Wylie's showing of good faith,[9] and the fact that its decision was not supported by what evidence was in the record, shows an abuse of discretion.

D. The Trial Court's Analysis of Prejudice to Glenncrest was Based Upon a Misapplication of Law and Fact.

After evaluating the four factors set forth in *Carrasco*, the court must weigh them against the risk of prejudice to the non-moving party. *Carrasco*, 988 A.2d at *475*. Here, the trial court determined that there was prejudice to Glenncrest because the unit had been re-rented:

> THE COURT: …It said, the non-moving party would be prejudiced. How would you be prejudiced of a vacated –
>
> MR. PUGH: Well number one, there's a $2500 due and number two, there's another tenant in the unit and I have a copy of the current lease if the court wants, and I personally testify that the unit's rented.
>
> …
>
> THE COURT: Well I guess the people would be prejudiced of they got to, if there's people already in there. They've got to put them out to put you in there.
>
> MS. WYLIE: Judge, I shouldn't ever got put out the first time.

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[9] Again, had the court not failed to hear testimony from Ms. Wylie, it would have been aware that, during the time between the eviction and the filing of her motion, Ms. Wylie was balancing a fulltime job, struggling to find housing for her three oldest children, and tending to her youngest child in the neonatal intensive care unit — a child who was born prematurely shortly after Ms. Wylie was evicted.

THE COURT: I guess they would be prejudiced.

Aplt. App. C at 25:15-25:21; 28:2-:28:7. The trial court apparently arrived at the conclusion that vacating the default in this case necessarily meant reinstating Ms. Wylie to the property, which it found would prejudice the landlord. However, this finding reflects a misapprehension of the law, and mischaracterization of the relief sought in Ms. Wylie's Motion to Vacate. In short, the trial court denied Ms. Wylie's Motion to Vacate because granting a separate motion — Ms. Wylie's motion for reinstatement — would prejudice Glenncrest. That is a legal non-sequitur. Nothing prevented the trial court from granting the Motion to Vacate and denying the Motion for Reinstatement. *See, e.g., Carrasco*, 988 A.2d 471. And because reinstatement to the property is only one of multiple remedies potentially available to a party moving to set aside a default judgment, the Motion to Vacate would not be moot if the Motion to Reinstate were denied; the grant of the Motion to Vacate would, by itself, have ensured that Ms. Wylie was not precluded on *res judicata* grounds from pursuing a claim against Glenncrest for wrongful eviction. *Id. (* citing *Threatt v. Winston*, 907 A.2d 780, 782 (D.C. 2006)). In light of the fatal flaws in Glenncrest's case, discussed more fully in Part III(B), Ms. Wylie has strong claims of wrongful eviction, which she is now precluded from raising because of the court's decision denying her Motion to Vacate.

Ms. Wylie did file a Motion for Reinstatement to the Property to be heard on the same date as her Motion to Vacate, but those two Motions were entirely separate and not, as the court appears to have treated them, interdependent. The court could deny the Motion for Reinstatement while granting the Motion to Vacate without causing Glenncrest the prejudice of being forced to remove a new tenant in order to restore Ms. Wylie to possession of the premises. Indeed, this court has actually found a *lack* of prejudice in vacating a default judgment after,

because "any prejudice to [the landlord] by further delay would be limited to the time and expense of additional proceedings since it had regained possession of the premises." *Jones v. Health Resources Corp.*, 509 A.2d 1140, 1145 (D.C. 1986).

Moreover, other remedies were available (and remain available) that would cause no harm to the landlord. For instance, because Glenncrest operates a large number of public housing units, the court could have required Glenncrest to place Ms. Wylie on the wait list for the next available unit. Indeed, because Ms. Wylie lost not only her home, but also her federal housing subsidy, as a result of this case, requiring Glenncrest to add her to the waitlist for the next available unit would be been the most equitable way in which to resolve the matter. This would have caused no prejudice to Glenncrest whatsoever. Had it been inclined to do so, the court had it within its power to remove the risk of prejudice to Glenncrest by simply denying Ms. Wylie's Motion for Reinstatement and providing alternative relief. But, importantly, the prejudice to be evaluated here is the prejudice from granting the motion to vacate the default judgment alone, not the prejudice that might result from any further relief.

Although the court does not appear to have based its decision on any other claim of prejudice, counsel for Glenncrest also asserted that Glenncrest would be prejudiced because "there's a $2500 due." Aplt. App. C at 25:18-25:19. However, being required to "return once more to court in order to establish [its] claimed entitlement to a judgment" is not prejudice. *W.H.H. Trice & Co. v. Faris,* 829 A.2d 189, 194 (D.C. 2003). Generally, when money is at stake, "there can be no prejudice to appellee from vacation of the default judgment since its claim will survive." *Mewborn v. U.S. Life Credit Corp.,* 473 A.2d 389, 391 (D.C. 1984).

Moreover, Glenncrest is precluded from claiming prejudice if, as happened here, "its own conduct substantially contributed to the default." *Id.* Ms. Wylie informed the court that her

failure to appear at the August 22, 2014 hearing was attributable to representations made to her by counsel for Glenncrest. Aplt. App. C at 9:20-10:2; Aplt. App. C at 22:11-22:15. Specifically, Ms. Wylie testified that she was led to believe that, if she complied with the terms of the May 22, 2014 agreement, the case against her would be resolved, and she need not appear for the next court date. *Id.*

The prejudice to Glenncrest is even less persuasive when weighed against the prejudice to Ms. Wylie: the judgment in this case was secured in part based on misrepresentations by counsel for Glenncrest; Ms. Wylie has lost not only her housing, but also her federally subsidized housing benefit; Ms. Wylie made good faith and diligent efforts at promptly filing her Motion to Vacate; and finally, Ms. Wylie endured extreme personal hardship as a result of the eviction and in the weeks leading up to the filing of her Motion. These extraordinary circumstances and extreme hardship alone justify the setting aside of the judgment in this case. *Miranda*, 754 A.2d at 281. ("A judgment may be set aside under "extraordinary circumstances" pursuant to Rule 60(b)(6)"); *Starling* 495 A.2d at 1161 (finding that 60(b)(6) is "properly invoked in extraordinary circumstances or where a judgment may work an extreme and undue hardship.")

Because there was no showing of actual prejudice to Glenncrest, the trial court's ruling cannot survive appeal.

IV. The Trial Court Proceedings Violated Ms. Wylie's Due Process Rights and Applicable Rules.

1. The court erred in relying upon an attorney as a fact witness. At the hearing on Ms. Wylie's Motion to Vacate, the trial court heard from Ms. Wylie and from Glenncrest's counsel, Ed Pugh. *See, generally* Aplt. App. C. Neither Ms. Wylie nor Mr. Pugh was sworn. *Id.* Both gave factual

testimony. *Id.* Despite the fact that a representative of Glenncrest was present, and Ms. Wylie asked that she be required to testify, the court heard only from Mr. Pugh. *Id.* at 26:6-26:8.

The D.C. Rules of Professional Conduct provide that an attorney should act as a witness only where "the testimony relates to an uncontested issue." Rules Of Prof'l Conduct R. 3.7(a)(1), D.C. Ct. Rs. Annot. (Supp. 1991). In interpreting that rule and the accompanying commentary, this court has written that:

> The basic reason for prohibiting an attorney from being both attorney and witness, [is] to avoid conflicts that arise when an attorney puts his or her own credibility at issue in litigation. Such conflicts may prejudice the client when the attorney's testimony is impeached on cross-examination, or may prejudice the opposing party, when the attorney's testimony is given undue weight by the fact-finder as a result of his dual role.

S.S. v. D.M., 597 A.2d 870, 877 (D.C. 1991) (citing *MacArthur v. Bank of New York*, 524 F. Supp. 1205 (S.D.N.Y. 1981)); *see also R.D. v. District of Columbia*, 374 F. Supp. 2d 84, 91 (D.D.C. 2005) (noting that a trial court has proper objection when trier of fact "may be confused or misled by a lawyer serving as both advocate and witness. . . . It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof"). This court has also held that a "violation of the Rule 3.7 creates, in effect, a rebuttable presumption of prejudice." *S.S.*, 587 A.2d at 877. If such prejudice results in a "miscarriage of justice," it may be grounds for reversal. *Id.* at 878 (finding no such miscarriage of justice where the testimony provided by the attorney was corroborated by other witnesses, and was cumulative or undisputed, and the trier of fact arrived at an "informed, independent judgment").

The basic reason articulated for the rule is particularly apposite here: Mr. Pugh's testimony was not limited to uncontested issues and Ms. Wylie was seriously prejudiced when the court relied upon Mr. Pugh's testimony in resolving key questions of fact. Unlike the finder

of fact in *S.S.*, the court here relied on no other witnesses or evidence; its decision was based largely upon the statements made by Mr. Pugh.

For instance, the court relied on Mr. Pugh's representation that the underlying case was entirely about rent, and not water bills, despite Ms. Wylie's protestations to the contrary. See *supra* Part III(B). The court further relied upon Mr. Pugh's assurances that the case did not relate in any way to the May 22, 2014 agreement of the parties, again despite Ms. Wylie's protestations to the contrary. See *supra* Part III(B). The court's prejudice analysis hinged upon Mr. Pugh's representation that the unit had been re-rented. See *supra* Part III(D). Its very limited review of Ms. Wylie's defenses was colored by Mr. Pugh's misrepresentations regarding the alleged lack of subsidy, the alleged inapplicability of the May 22, 2014 agreement, and the alleged exclusion of utility charges from the complaint. See *supra* Part III(B).

On these occasions, the representations made by Mr. Pugh were not constrained to legal argument properly made by an attorney, and instead included factual propositions more appropriate for a non-advocate fact witness. See *supra* Parts III(B), III(D). That some of these claims made by Mr. Pugh turned out to be false[10] is evidence that Mr. Pugh had crossed a line from offering uncontested factual proof to offering legal analysis — albeit incorrect legal analysis — of the proof. *R.D.*, 374 F. Supp. 2d at 91.

Though it is true that an attorney may act as witnesses in disputed hearings when his testimony is *necessar*y, in general, he may only do so if he first withdraws as counsel. *R.D. v. District of Columbia*, 374 F. Supp. 2d 84, 91 (D.D.C. 2005) ("[S]he must choose between testifying under oath or serving as counsel; she will not be permitted to do both."). In this case,

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[10] *See* discussion, *supra*, Sect. III(B).

however, Mr. Pugh's testimony was far from necessary; seated beside him throughout the entire January 8, 2015 hearing was a representative from Glenncrest who was not only able to testify as to all relevant facts, but was in fact better qualified than Mr. Pugh to do so. Yet, despite Ms. Wylie's request that she be allowed to testify, the court refused to hear testimony from that representative. Aplt. App. C at 26:6-26:8.

The court's reliance upon Mr. Pugh's statements as an advocate-witness, despite the immediate availability of an appropriate fact witness, was misplaced.[11]

2. The court erred in failing to allow Ms. Wylie opportunity to argue the merits of her motion. In addition to its mistaken reliance upon testimony from an attorney, the court failed to allow Ms. Wylie the opportunity to argue the merits of her motion. As discussed more fully above, Ms. Wylie tried repeatedly to put on evidence, and each time was rebuffed by the court. See supra Parts III(A)-III(C). Moreover, the hearing closely resembled a cross-examination by the court; the court asked more than eighty close-ended, direct questions without ever once allowing Ms. Wylie to fully discuss her claims. *See generally* Aplt. App. C. Due process of law includes the right of a party to present evidence in support of her claim. *See, e.g., N.D. McN. V. R.J.H.*, 979 A.2d 1195, 1201 (D.C. 2009) ("Due process includes the right to present evidence."); *Garcia v. Andrade*, 622 A.2d 64, 66 (D.C. 1993) (stating that movant "was entitled to present evidence in support of his claim"). Ms. Wylie was denied that process here.

Even where Ms. Wylie was allowed to articulate facts in support of her Motion to

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[11] The court also apparently gave greater weight to Mr. Pugh's testimony because he represented the non-moving party: "…And the things you say, he says just the opposite, and I don't know necessarily, you're the moving party, that I'm going to credit your statement over his statement. I think it's a difficult proposition."Aplt. App. C at 29:13-29:17. It is not at all clear what legal basis the court had for doing so.

Vacate, the court invariably failed to make the necessary follow up inquiry into those claims. See *supra* Parts III(A)-III(C). It was the court's responsibility to make sufficient inquiry to determine whether Ms. Wylie had an entitlement to relief. *See, e.g.*, *Miranda* 754 A.2d at 280; *Reid v. District of Columbia*, 634 A.2d 423, 425 (D.C. 1993). Here, the court's inquiry was plainly insufficient to meet that standard.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed, and the case remanded to the Superior Court for a complete hearing on Ms. Wylie's Motion to Vacate Default.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellant Turquoise Wylie to be delivered by first-class mail, postage prepaid, this 8th day of July, 2015, to:

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