No. 15-CV-954

DISTRICT OF COLUMBIA COURT OF APPEALS

DIONNE SMITH,

Appellant

v.

GREENWAY APARTMENTS, LP,
T/A MEADOW GREEN COURTS,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT

OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

REPLY BRIEF OF APPELLANT

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Greenway Apartments' brief contains a dispositive concession: that Ms. Smith's counterclaims at issue here – counterclaims based on housing code violations for months as to which there was no judgment below – are "permissive under Super. Ct. L&T R. 5(b)." Appellee Br. 10; *see also id.* at 7 (agreeing with Ms. Smith "that the plain language of the rule [SCR-LT 5(b)] indicates that a tenant's counterclaim for a money judgment or set-off is permissive"). This point of agreement between the parties should be the beginning and end of this Court's analysis. The very definition of a permissive counterclaim is one that "may be brought in a later, separate action." Black's Law Dictionary 402 (9th ed. 2009); *see also* Restatement (Second) of Judgments § 22(1). Because the parties here agree that, under the applicable Landlord and Tenant Branch Rule 5, the counterclaims at issue are permissive, it necessarily follows that the failure to assert these counterclaims earlier cannot preclude their assertion in a later, separate action. This straightforward reasoning mandates reversal here.

Greenway attempts to avoid this simple legal reality by asserting that the ordinary rules of res judicata do not apply, because of the "unique" and "ongoing nature" of the landlord-tenant relationship. Appellee Br. 1, 3, 4-6. The fundamental flaw in this argument is that it relies on supposed unique aspects of the landlord-tenant relationship to justify departing from the res judicata consequences of a special counterclaim rule that was *specifically adopted to govern eviction cases in the Landlord and Tenant Branch.* Greenway may be right that Ms. Smith's counterclaims would be considered compulsory – and therefore precluded – under background legal principles or the Rules of Civil Procedure. Greenway also can make its own policy arguments for why it believes all counterclaims by tenants should be treated as compulsory. But that is of no moment when the authors of Landlord and Tenant Branch Rule 5 made a deliberate choice to designate all counterclaims in the Branch as permissive. As a result of that choice –

one that is a fair and practical balancing of both parties' interests and the needs of the Branch – Ms. Smith's counterclaims are permissive, and thus are not barred as a matter of blackletter claim preclusion law.

Greenway Refuses to Acknowledge That Permissive Counterclaims Are Different.

Greenway devotes significant time in its brief to reciting the rules that apply to *compulsory* counterclaims, and specifically the oft-repeated general rule that claim preclusion bars a party to a final judgment from later seeking relief based on claims that might have been raised in the prior action. *See* Appellee Br. 4-10. What Greenway fails to acknowledge or in any way grapple with is that *permissive* counterclaims like Ms. Smith's are subject to an exception to that general rule: they may be brought in a separate, later proceeding. *See* Aplt. Br. at 8-9. Greenway's suggestion that the same claim preclusion rules apply to Ms. Smith's permissive counterclaims is plainly wrong and, indeed, is contrary to the very definition of a permissive counterclaim. *See, e.g.*, *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 671 (1944) ("The fact that [a claim] *might* have been asserted as a counterclaim in the prior suit . . . does *not* mean that the failure to do so renders the prior judgment res judicata as respects it.") (emphasis added); *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 386 U.S. App. D.C. 328, 335, 569 F.3d 485, 492 (2009) (recognizing the "general rule" that a prior failure to file a counterclaim is not res judicata unless the counterclaim is mandatory); *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 269 U.S. App. D.C. 53, 56, 843 F.2d 546, 549 (1988) ("Where a defendant neither asserts, nor is required to assert, a counterclaim . . . the previously unlitigated issues will not later be estopped by the earlier action.").

Greenway relies heavily on Judge Epstein's trial court opinion in *Novo Development Corporation v. Thomas*, quoting the decision at length. But the passages cited by Greenway all

relate to an issue that Ms. Smith concedes in this appeal: that she cannot re-litigate the amount of rent due for months specifically covered by two prior judgments between the parties. *See* Appelle Br. 4-6; Aplt. Br. 13-14. Greenway acknowledges that "Judge Epstein leaves open the possibility in his opinion in [the] *Novo Dev. Corp.* case that Tenant's argument here has merit." Appellee Br. 5 n.1. In fact, Judge Epstein expressly endorses the same argument regarding permissive counterclaims that Ms. Smith made in her opening brief and reiterates here:

> Because the consent judgment covered rent due for March-May 2012, it would not preclude Mr. Edwards from later raising claims based on housing code violations that arose after he moved into the apartment in August 2009 but ended before March 2012 . . . Any counterclaim in [the earlier consent judgment case] for that earlier period would have been permissive rather than compulsory, and the general rule is that failure to assert a permissive counterclaim does not preclude the party from asserting that claim in a later case. *See Henderson v. Snider Bros., Inc.*, 439 A.2d 481, 486 (D.C. 1981) (en banc) (*citing Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 671 (1944)).

2012 LTB 017628, at *4 n.1 (D.C. Super. Ct. Apr. 30, 2013).

Greenway also suggests that Ms. Smith's statement in February 2013 to the Interview and Judgment Officer approving the first consent judgment that she had no housing code violations at that time precludes Ms. Smith from now claiming that there were housing code violations at any time over a period of many years. Appellee Br. 9-12. This is wrong as a matter of law and of fact. As a matter of law, *judgments* can have preclusive effects; parties' statements do not. At best Ms. Smith's statement is an admission and fodder for future cross examination; it is irrelevant to claim preclusion analysis. As a matter of fact, Ms. Smith made clear in her trial testimony below that the housing code violations in her unit were not uniform and constant but varied over time. Her statement that no violations existed as of a particular date and time is

entirely consistent with her claims that violations waxed and waned over a period of many months.[1]

Finally, given Greenway's concession that Ms. Smith's counterclaims are permissive, arguments about whether Ms. Smith's claims "arise out of the same transaction" as the landlord's claims for nonpayment of rent – to which Greenway devotes an entire section of its brief – are simply irrelevant. App. Br. 9-10. This test – found in Rule 13 of the Rules of Civil Procedure – does not apply here. The framers of the Rules for the Landlord and Tenant Branch deliberately chose not to incorporate this framework, *see* Super. Ct. L&T R. 2 (omitting Rule 13 from a list of Superior Court Rules of Civil Procedure incorporated in the Branch), but instead to adopt a special rule for the Branch making all counterclaims permissive. *See id.* R. 5(b). For Greenway to avoid the consequences of this Rule by pointing to the unique, ongoing nature of the landlord-tenant relationship simply turns the Landlord and Tenant Branch Rules on their head. Rule 5 is a special counterclaim rule that was adopted by the Landlord and Tenant Branch to govern this very type of proceeding, and it fully answers the question presented in this case.

Greenway's Policy Arguments Do Not Advance Their Arguments. Greenway attempts to advance its own policy arguments in favor of a contrary rule. Those policy arguments are irrelevant because the parties (and the courts) are bound by the applicable rules, not by their own sense of what would be the best policy. But even if this Court were to consider Greenway's arguments, they are simply wrong and provide no justification for departing from the purposeful choice of Rule 5's drafters to make all counterclaims in the Landlord and Tenant Branch

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[1] Ms. Smith's statement also must be considered in context. As some tenants know, answering yes when the Interview and Judgment Officer asks about housing code violations means the case will be sent into the courtroom to be heard by the presiding judge, a move that may add hours to a tenant's waiting time that day.

permissive. For all the reasons set forth in Ms. Smith's opening brief, making counterclaims involving housing code violations compulsory would conflict with the Branch's goal of securing "the just, speedy, and inexpensive determination of every action." Super. Ct. L&T R. 1. *See* Aplt. Br. 10-12.

Greenway's suggestion that Ms. Smith and unrepresented tenants like her are "experienced" litigants whose counterclaims should, for policy reasons and in contravention of Rule 5, be deemed compulsory is particularly pernicious. Appellee Br. 11. The fact that Ms. Smith has been the subject of multiple eviction cases that, as Greenway acknowledges, quickly became moot and were dismissed before the first court date – meaning Ms. Smith never even had to appear – hardly endowed her with special knowledge or legal expertise.[2] Greenway also notes Ms. Smith had the benefit of information conveyed by the presiding judge about her rights and the court process, and speculates further that she must have received help from the Landlord and Tenant Resource Center. But Greenway's suggestion that tenants who consult with the Resource Center surely would receive advice of the position it advances in this appeal – a position contrary to blackletter claim preclusion law – is simply circular. The reasonable speculation would be that the Resource Center – like Greenway itself – would have relied on trial court decisions such as *Novo Development Corporation v. Thomas*, which, as noted above, clearly states that such counterclaims are permissive and that the failure to raise them has no future preclusive effect.

For this reason, Greenway's demand that Ms. Smith should "be held accountable" because "she was aware of the consequences of her actions" is absurd to the point of offense.

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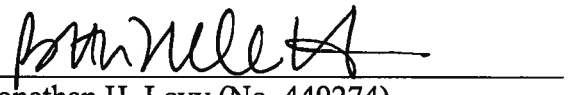
[2] Even the most experienced litigant benefits from representation, particularly in eviction suits governed by "hypertechnical" District of Columbia landlord-tenant law. *Banks v. Eastern Savings Bank*, 8 A.3d 1239, 1243 (D.C. 2010). There is no better evidence of this point than the fact that over 90 percent of landlords – many of whom are experienced, repeat players in the Landlord and Tenant Branch – secure counsel in eviction matters.

Appellee Br. 11-12. Ms. Smith was an unrepresented litigant, who may or may not have received legal information, and, if so, likely received information directly contrary to the position advanced by Greenway in this appeal. The reality is that the vast majority of unrepresented tenants likely do not understand the most basic legal concepts governing their legal disputes, much less complex legal questions such as claim preclusion. *See* Public Justice Center, *Justice Diverted: How Renters Are Processed in the Baltimore City Rent Court* 19-20 (Dec. 2015) (finding 73 percent of tenants were unaware that housing code violations are a defense to nonpayment of rent and 86 percent were unaware of their right to rent abatement on that basis). Such a litigant hardly is equipped to represent herself effectively, even with the best legal advice and information, particularly when it comes to the vagaries of claim preclusion law and the implications of a decision not to raise theoretical claims that were unmentioned – and perhaps unconceived of – by any of the parties involved. It is this reality – not the contrary vision advanced by Greenway – that should inform this Court's consideration of the practical consequences of its ruling in this case.

In sum, there is much in Greenway's brief that is irrelevant to this appeal. What is unquestionably relevant is the key concession that Rule 5 of the Landlord and Tenant Branch Rules governs this matter and makes Ms. Smith's counterclaims permissive, meaning that her failure to raise those counterclaims in a previous action has no preclusive effect on her ability to raise them now. That concession mandates reversal. Judge Epstein provided the proper analysis of the issue here in the *Novo Development Corporation* case relied upon by Greenway, and this Court should apply that same analysis here.

Respectfully submitted.



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CERTIFICATE OF SERVICE

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