No. 15-CV-91

DISTRICT OF COLUMBIA COURT OF APPEALS

MICHELLE D. SMITH,

Appellant,

v.

ROSA VENTURA AND MAURICIO ENAMORADO,

Appellees.

On Appeal from the District of Columbia Superior Court
(2014-LTB-31653)

BRIEF OF APPELLEES

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**Presenting oral argument*

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

The parties in this case are Michelle D. Smith, the landlord and appellant, and Rosa Ventura and Mauricio Enamorado, the tenants and appellees. Before the D.C. Superior Court, the parties were not represented by counsel. Before this Court, Ms. Smith remains unrepresented, and Ms. Ventura and Mr. Enamorado are represented by Paul Perkins and Jonathan H. Levy of the Legal Aid Society of the District of Columbia. No intervenors or *amici* have appeared.

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BRIEF OF APPELLEES

ISSUES PRESENTED

1. Is a lease provision purporting to allow a landlord to evict a tenant for "recurrent and excessive repairs" that are "not caused by the tenant" valid, and, if so, can a landlord evict a tenant after spending less than $200 in attempted repairs?

2. Was the trial court's conclusion that a housing unit lacking both heat and hot water during the winter had no rental value clearly erroneous?

STATEMENT OF FACTS

On December 13, 2013, Rosa Ventura and Mauricio Enamorado leased an apartment from Michelle D. Smith at 433 Kennedy Street NW, #4, Washington, DC 20011.[1] Appendix

[1] Two other individuals, Manuel Penado and Angelica Martinez, leased the apartment with Ms. Ventura and Mr. Enamorado until the parties signed a release on May 24, 2014. Ap. Tab 1, at 1; Ap. Tab 2, at 1-3.

("Ap.") Tab 1, at 1. The Lease specified that Ms. Ventura and Mr. Enamorado would pay Ms. Smith $1,550 a month in rent, and that after one year, the lease would turn into a monthly tenancy. Ap. Tab 1, at 1, 6. Among other obligations, Ms. Smith contracted to "deliver the premises . . . in a habitable condition," and Ms. Ventura and Mr. Enamorado contracted to maintain the premises "in a state of good order and condition," to pay for the "repairs . . . of property . . . due to the negligence . . . of Tenant," and to "properly use and operate all . . . fixtures and appliances." Ap. Tab 1, at 3.

The parties also signed an addendum to the lease, which included a clause entitled "Excessive Recurrent Repairs (due to no fault of tenant)" (the "Excessive Repairs Clause"). That clause provided:

> In the event that repairs to one or more structures or systems in tenants[']s apartment are recurrent and excessive in the landlord[']s opinion and said problems are not caused by the tenant, the landlord shall have the right to take said unit off the market for further repair and examination. Landlord shall give tenant notice of the problems and landlord[']s inability to solve the problems and give the tenant notice to vacate in 30 days. The landlord shall have no duty to invite tenant to return to said apartment after the landlord completes said examination and repair of the unit.

Ap. Tab 1, at 10. The Superior Court noted that this particular provision was "not standard" and "anything but ordinary." Ap. Tab 22, at 11. Ms. Smith testified that she included this provision in the lease "in the event that I was not financially able to do the repairs for the apartment because my lines of credit were reduced . . . [and] in case I got a tenant who was very, very difficult with regard to the, you know, excessive with regard to the repairs." Ap. Tab 22, at 11-12.

On June 8, 2014, the water heater in the unit stopped working. Ap. Tab 3. Ms. Ventura immediately notified Ms. Smith, who dispatched a plumber the following day. *Id.* After

inspecting the water heater, the plumber ordered a part and returned to install it on June 14. Ap. Tabs 3, 5. An exhibit introduced at trial indicates that Ms. Smith was charged $142 for parts and labor. Ap. Tab 5. Five days later, Ms. Ventura notified Ms. Smith that she smelled gas in the apartment. Ap. Tab 3. Ms. Smith instructed Ms. Ventura to contact Washington Gas, which she did. *Id.* Washington Gas arrived the same day and shut off the gas to the water heater after detecting a gas leak. Ap. Tabs 3, 6. Ms. Smith scheduled a plumber to fix the gas leak on June 26. Ap. Tab 3. An exhibit introduced at trial indicates that Ms. Smith was not charged for this work. Ap. Tab 4.[2]

Ms. Smith testified at trial that she believed that Ms. Ventura and Mr. Enamorado were responsible for the water heater problems. Ap. Tab 22, at 16. But Ms. Smith also admitted, "I don't have any proof of it," *id.*, and, accordingly, the Superior Court found "nothing in the evidence that points to anything the tenants were doing to create the problem," Ap. Tab 22, at 44. Instead, the court found, "the problem was born of two sources[:] equipment that probably needs to be replaced rather than repaired[, and] the company that [Ms. Smith] used, somebody ordered the wrong part." *Id.*

On September 18, 2014, Ms. Smith filed a 30-day notice to correct or vacate with the D.C. Department of Housing and Community Development alleging that Ms. Ventura and Mr. Enamorado were in violation of the obligations of their tenancy for "excessive recurrent repairs (due to fault or no fault of tenant)." Ap. Tab 7, at 2-3.

[2] The Superior Court found that Ms. Smith paid an unspecified service charge for the plumber's third dispatch to the apartment, Ap. Tab 22, at 38, 44-45, but the receipt presented by Ms. Smith indicates otherwise, *see* Ap. Tab 4 ("This Repair is valued at: $137 . . . This Service Performed at No Charge.").

Between November 2 and 4, 2014, Ms. Ventura notified Ms. Smith numerous times by email and voicemail that the water heater had stopped working again. Ap. Tab 8. Washington Gas ended up turning off the gas to both the water heater and the furnace, which left the unit without hot water and heat for several months. Ap. Tab 12; Ap. Tab 22, at 23 ("We've been without . . . hot water and heat in the apartment" for "almost three months"). From November 10 through November 26, a number of workers attempted to repair the water heater, the furnace, and a toilet, which had been leaking. Ap. Tabs 9-14, 21. Ms. Smith's exhibits indicate that she was charged a total of $1,642. *Id.*

On December 6, 2014, Ms. Smith filed a complaint against Ms. Ventura and Mr. Enamorado for possession of the rental unit based upon: 1) failure to vacate after the service of the September 18, 2014 notice to correct or vacate, and 2) nonpayment of rent for December 2014. Ap. Tab 19, at 1. With respect to the alleged lease violations, the complaint lists "excessive recurrent repairs." Ap. Tab 19, at 2.[3] The Superior Court entered a protective order on December 31, 2014, requiring Ms. Ventura and Mr. Enamorado to pay $750 into the Court Registry by the 5th day of each month starting in January. *See* D.C. Super. Ct. Docket No. 13, No. 2014 LTB 31653 ("Dkt.").

On January 20, 2015, Judge Rankin presided over a trial during which he entered judgment on the merits against Ms. Smith, disbursed the $750 in funds entered into the court registry to Ms. Ventura and Mr. Enamorado, and dismissed the case. Dkt. No. 6. The Superior Court found two problems with the September 18, 2014 notice to correct or vacate. First, the Excessive Repairs Clause was invalid because it "violate[d] health and safety laws that the city

[3] The complaint appears to say more about the alleged lease violation, but the copy in the appendix is difficult to read. Ap. Tab 19, at 2. In any event, the only allegations at issue in the trial were the alleged excessive repairs and the non-payment of rent.

has put in place to protect public safety, public health, [and] public welfare," by waiving the non-waivable implied warranty of habitability. Ap. Tab 22, at 36; Ap. Tab 22, at 41 ("what you contract for is habitable premises and the law guarantees that to you"); Ap. Tab 22, at 44 ("the notice to [correct or vacate] was given for a reason that is something the landlord has responsibility for. You can't delegate away that responsibility."). Second, there was insufficient evidence to support a claim of excessive and recurrent repairs. Ap. Tab 22, at 12-18, 44. Only repairs prior to the date of the notice to correct or vacate were relevant, and those repairs were "clearly insufficient for a notice to [correct or vacate] based on excessive recurrent repairs." Ap. Tab 22, at 18.

The Superior Court also determined there was no basis to proceed with the nonpayment of rent portion of the complaint because "there [wa]s not a functioning furnace[or] hot water" "for the month of December." Ap. Tab 22, at 36, 40. The court further explained, "What you contract for is reasonable rent for providing habitable housing, and as long as you're providing habitable housing, you're legally entitled to reasonable rent, but it's a two-way street." Ap. Tab 22, at 41.

Ms. Smith filed a notice of appeal on January 20, 2015, and an amended notice of appeal on February 18, 2015.

SUMMARY OF THE ARGUMENT

By regulation and common law, a non-waivable warranty of habitability is implied in every residential lease in the District of Columbia, requiring landlords to provide premises meeting minimum standards including the availability of heat and hot water. Ms. Smith did not want to be required to maintain the habitability of the unit she leased to Ms. Ventura and Mr. Enamorado in the event she ran low on funds, so she added a lease provision that purported to

allow her to evict them for "excessive" repairs that were not their fault. The Superior Court correctly determined that Ms. Smith's lease provision was a facially invalid attempt to nullify the warranty of habitability. The Superior Court also correctly determined that the three water heater repairs costing Ms. Smith $142 were not excessive.

Ms. Smith's further attempt to evict Ms. Ventura and Mr. Enamorado for withholding rent in December 2014 was also without legal support. District law permits a tenant to withhold rent when substantial housing code violations are present and the landlord fails to make repairs. As the Superior Court held, Ms. Smith's failure to provide heat and hot water rendered the unit uninhabitable, justifying total rent abatement.

STANDARD OF REVIEW

This Court reviews the Superior Court's legal conclusions *de novo* and its findings of fact for clear error. *Hernandez v. Bryant Banks*, 84 A.3d 543, 552 (D.C. 2014). The clear error standard is highly deferential toward the lower court, such that this Court will not "reverse the finding of the trier of fact simply because it is . . . convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Dorsey v. United States*, 60 A.3d 1171, 1205 (D.C. 2013).

ARGUMENT

I. MS. VENTURA AND MR. ENAMORADO CANNOT BE EVICTED BASED ON THE "EXCESSIVE AND RECURRENT REPAIRS" LEASE PROVISION.

A. This Lease, Like All Residential Leases in the District, Includes a Non-Waivable Implied Warranty of Habitability.

"In the District of Columbia, every lease for residential housing includes an implied warranty of habitability," *Wright v. Hodges*, 681 A.2d 1102, 1105 (D.C. 1996), which requires the landlord to "maintain the premises in compliance with" the D.C. housing code, 14 DCMR § 301.1.[4] Accordingly, "violations of the D.C. Housing Regulations" constitute "a breach of the warranty of habitability." *Pajic v. Foote Props., LLC*, 72 A.3d 140, 148 (D.C. 2013); *see Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970) (the "warranty of habitability[is] measured by the standards set out in the Housing Regulations for the District of Columbia"); *George Washington Univ. v. Weintraub*, 458 A.2d 43, 46 (D.C. 1983) ("landlords are required to comply substantially with the Housing Regulations of the District of Columbia").

To comply with the implied warranty of habitability, a landlord must ensure that every residential unit has both hot water and heat. Specifically, 14 DCMR § 606.1 provides that a residential unit must have "a water heating facility which is properly connected with the hot water lines of the required fixtures, and which is capable of providing sufficient hot water at a temperature of not less than one hundred twenty degrees Fahrenheit (120° F.) at those fixtures to meet normal demands." And 14 DCMR § 501.1 specifies that a landlord must provide and

[4] The "housing code" is contained within chapters 4 through 8 of Title 14. *See* 14 DCMR §§ 400, *et seq.* ("Housing Code: General Requirements"); 14 DCMR §§ 500, *et seq.* ("Housing Code: Heating, Lighting, and Ventilation"); 14 DCMR §§ 600, *et seq.* ("Housing Code: Facilities, Utilities, and Fixtures"); 14 DCMR §§ 700, *et seq.* ("Housing Code: Construction, Maintenance, and Repairs"); 14 DCMR §§ 800, *et seq.* ("Housing Code: Cleanliness, Sanitation, and Safety").

maintain "in good repair" an "[a]dequate heating facilit[y] . . . capable of maintaining a minimum temperature of seventy degrees Fahrenheit (70° F.)." The frequent lack of either hot water or heat is a "substantial housing violation[]." 14 DCMR § 1799. These specific obligations are in addition to the broader duty requiring a landlord to "provide decent living accommodations for the occupants" of a premises by conducting "repairs and maintenance designed to make a premises . . . healthy and safe." 14 DCMR § 700.1-2.

Importantly, the implied warranty of habitability cannot be waived or delegated. *Wright*, 681 A.2d at 1107 ("[T]he implied warranty of habitability cannot be waived."); *Javins*, 428 F.2d at 1081-82 ("The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor."). Any provision purporting to waive such an unwaivable duty is void. 14 DCMR § 304.1 ("Any provision of any lease or agreement contrary to, or providing for a waiver of, the terms of this chapter . . . shall be void and unenforceable.").

The District's determination that the warranty of habitability cannot be waived is based in part on the inherent power disparity and unequal bargaining power between a landlord and a tenant. *See Javins*, 428 F.2d at 1079 n.44 (collecting sources). The disparity exists primarily because "[t]enants have very little leverage to enforce demands for better housing." *Id.* at 1079. Where the supply of affordable housing is increasingly limited and the demand is continually growing, "landlords [can] place tenants in a take it or leave it situation." *Id.*; *see* Aaron C. Davis, *Study: No Inexpensive Housing is Left on Open Market in D.C.*, THE WASHINGTON POST, Mar. 12, 2015, http://www.washingtonpost.com/local/dc-politics/study-no-inexpensive-housing-left-on-open-market-in-dc/2015/03/11/281aaa94-c80c-11e4-b2a1-bed1aaea2816_story.html ("The District's supply of low-cost rental apartments has continued to plummet in recent years, putting

housing out of reach for a greater share of low-wage earners"). This Court's assessment of the situation 45 years ago remains valid:

> Courts in the District of Columbia have taken judicial notice of the housing shortage. . . . We must also consider the economic pressure on low income tenants and the great disparity in bargaining position between landlords and such a tenant. In reality, a tenant is often unable to bargain at all and may be forced to accept a house that violates the regulations or sleep in the street.

William J. Davis, Inc. v. Slade, 271 A.2d 412, 415 (D.C. 1970).[5] Without the District's imposition of an unwaivable warranty of habitability, tenants might agree to lease terms – like the Excessive Repairs Clause – that unfairly shift the burden of property maintenance from the landlord to the tenant.

B. The Excessive Repairs Clause Impermissibly Attempts to Waive the Implied Warranty of Habitability.

The Excessive Repairs Clause purported to give Ms. Smith the right to "give the tenant notice to vacate in 30 days" if Ms. Smith determined that "recurrent and excessive" repairs were required to "one or more structures or systems in tenants[']s apartment." Ap. Tab 1, at 10. This clause ostensibly conferred on Ms. Smith the absolute right to evict Ms. Ventura and Mr. Enamorado for any reason related to the repair of a structure or system in the apartment – as long as the repairs were "recurrent and excessive," a standard that Ms. Smith left intentionally up to her own subjective judgment. Smith Brief at 20-21 (Ms. Smith's assertion that "[t]he plain language of this lease gives the landlord full and clear authority to determine what . . . constitutes

[5] This power disparity is especially evident in the present case. Ms. Smith owns two rental apartment buildings, Ap. Tab 22, at 24-25, and is a member of the bar of this Court, DC Bar, Find A Member, https://www.dcbar.org/membership/find-a-member.cfm (search on June 24, 2015 yielded: "Michelle D Smith[,] Homeowners Legal Counsel PLLC[,] 433 Kennedy Street NW[,] Unit 1[,] Washington DC 20011[;] Membership Status: Active[;] Date of admission: March 3, 1995"). By contrast, Ms. Ventura and Mr. Enamorado are not attorneys and have limited means, and Mr. Enamorado has limited English skills.

excessive and recurrent repairs"). By its text, this is a bald attempt to avoid the obligations of the implied warranty of habitability, which requires maintenance of "structures" and "systems" in a rented apartment, including the water heater and furnace. *See* Section I.A, *supra*.

This clause is particularly troubling when read in light of Ms. Smith's stated purpose of including it in the lease. At trial, Ms. Smith made it abundantly clear that she inserted this unusual clause because she wanted the ability to unilaterally opt out of her obligation to maintain the apartment if doing so cost more than she wanted to spend. Ap. Tab 22, at 11-12. This is directly contrary to the implied warranty of habitability, which requires a landlord "to keep his premises in a habitable condition." *Javins*, 428 F.2d at 1077. A landlord is not permitted to avoid the costs associated with complying with the implied warranty of habitability. *Wright*, 681 A.2d at 1107-08.

Ms. Smith's attempted application of the Excessive Repairs Clause here further demonstrates that it is an invalid attempt to waive the implied warranty of habitability. Prior to Ms. Smith's filing of the September 18, 2014 notice to correct or vacate, she made a single attempt to repair the water heater, which resulted in three visits by workers – one to assess the problem and order the necessary part, a second to install that part, and a third to repair a gas leak caused by the previous visit. *See* Ap. Tabs 3-6. Even though she only spent $142, Ap. Tabs 4-5, she concluded that the repairs were "excessive and recurrent," Ap. Tab 22, at 18, and she started the eviction process, Ap. Tab 22, at 12, 18. Her express motive was to avoid repair costs. Ap. Tab 22, at 31 ("[M]y lines of credit were . . . tapped out . . . [s]o, no cash, no credit, no repair").[6]

[6] Even if it were true that Ms. Smith would have difficulty affording the repairs, that is not a basis to evict Ms. Ventura and Mr. Enamorado. *See* D.C. Code § 42-3505.01 (limiting eviction to specified statutory bases). Ms. Smith's claim of financial hardship would have been properly raised, if at all, in defense to the court's use of its injunctive powers to compel her to make repairs. But the trial court made no such order here, nor did the tenants seek one. Instead,

Ms. Smith took this action despite D.C. housing code regulations requiring her to maintain the premises by providing both hot water and heat. 14 DCMR §§ 501.1, 606.1. In fact, as the Superior Court correctly found, when a unit's water heater and furnace stop working, a landlord is not permitted to avoid the cost of repair by evicting the tenant. Ap. Tab 22, at 44; *see* D.C. Code § 42-3505.01(a)-(b) (eviction is only permitted for "nonpayment of rent" or if the tenant is "violating an obligation of tenancy"). Rather, the landlord must repair the water heater and furnace. 14 D.C.M.R. §§ 501.1, 606.1; *see Weintraub*, 458 A.2d at 46; Ap. Tab 22, at 25, 36, 44 (the Excessive Repairs Clause is invalid because it "violates health and safety laws that the city has put in place to protect public safety, public health, [and] public welfare," and because it attempted to "delegate away" "something the landlord has responsibility for").

C. The Repairs to the Unit were Not Excessive.

Regardless of the validity of the Excessive Repairs Clause, no excessive repairs justified Ms. Smith's attempt to evict Ms. Ventura and Mr. Enamorado. Ms. Smith submitted evidence of three repair visits before September 18, 2014, costing her a total of $142. Ap. Tabs 3-6. These three visits do not fit any definition of "excessive," as Ms. Smith admitted at trial. Ap. Tab 22, at 44. Ms. Smith cannot now raise additional grounds for eviction that she did not identify in the September 18, 2014 notice to correct or vacate. *See Clark v. Bridges*, 75 A.3d 149, 154 (D.C.

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all the Superior Court ordered was that Ms. Smith could not collect rent so long as the premises lacked heat and hot water. And even if the tenants had sought to compel Ms. Smith to make repairs, Ms. Smith could have sought financial assistance through the Department of Consumer and Regulatory Affairs' Nuisance Abatement Fund. *See* How We Use Nuisance Abatement Fund, http://dcra.dc.gov/service/how-we-use-nuisance-abatement-fund (last visited June 24, 2015) ("In life-or-health threatening situations DCRA has the authority to take summary corrective action. These situations include . . . [i]nterruption of electrical, heat, gas, water or other essential services, when the interruption results from other than natural causes."). What Ms. Smith could not do was rewrite the implied warranty of habitability so that it only applied when she determined that her personal finances rendered compliance convenient.

2013) ("the landlord had to prove that the claimed violations of the lease occurred during the six-month period that preceded [the] notice of eviction").[7]

II. MS. VENTURA AND MR. ENAMORADO WERE LEGALLY JUSTIFIED IN WITHHOLDING RENT BECAUSE THEIR APARTMENT WAS UNINHABITABLE.

The Superior Court dismissed Ms. Smith's nonpayment of rent claim because "there [wa]s not a functioning furnace[or] hot water" "for the month of December" 2014, which was the only month for which Ms. Smith alleged a failure to pay rent. Ap. Tab 19, at 1; Ap. Tab 22, at 36. The court also ordered that the single payment of $750 that had been paid into the court's registry be returned to Ms. Ventura and Mr. Enamorado. Ap. Tab 22, at 47-48. The court explained that because Ms. Smith was no longer "providing habitable housing," she was no longer "legally entitled to reasonable rent." Ap. Tab 22, at 41. In short, the Superior Court determined that the unit's rental value without heat or hot water was zero. That determination is a finding of fact, *see Javins*, 428 F.2d at 1082-83, and should be affirmed because it is supported by the record, *see Chibs v. Fisher*, 960 A.2d 588, 589 (D.C. 2008).

[7] Ms. Smith's brief relies on an accusation against Ms. Ventura and Mr. Enamorado for "repeatedly removing the electrically wired smoke detectors," Smith Brief at 19, 22-24. Although during trial Ms. Smith alleged one instance when the smoke alarm was removed, Ap. Tab 22, at 17-18, these accusations are nowhere to be found in the September 18, 2014 notice to correct or vacate, and therefore were properly not considered by the Superior Court. Ms. Smith's brief also contains irrelevant allegations regarding repair attempts that took place months after the notice to correct or vacate, *id.* at 9-10, 26, and that the Superior Court also rightly ignored. At any rate, even Ms. Smith's allegations regarding repair attempts after September 18, 2014 do not constitute excessive repairs, as they involved a total cost of $1,642, which is reasonable to restore hot water and repair a gas leak involving apparently decrepit appliances and which amounts to barely more than one month's worth of the rent Ms. Smith was collecting from the tenants. Ap. Tab 22, at 44 ("you have some equipment that probably needs to be replaced rather than repaired"); Ap. Tab 22, at 45 ("this is not a problem of cracks in the wall or, you know, floor that needs painting or something. This is in the nature of heat and hot water.").

"[T]he tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition." *Javins*, 428 F.2d at 1082. When a landlord breaches the implied warranty of habitability, a tenant may withhold all or part of the rent for the unit, *Chibs*, 960 A.2d at 589, and the amount of the abatement is based on the "as is" rental value of the unit, which may be zero. *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991); *Chibs*, 960 A.2d at 589 ("The factfinder may award anything from no abatement to a total abatement.").

The Superior Court here necessarily found that the "as is" rental value of the unit was zero because it lacked both heat and hot water. That factual finding is not clearly erroneous. It is uncontested that the unit lacked heat and hot water in violation of the housing code. *See* 14 DCMR §§ 501.1, 606.1. Especially in December and January, it was not clearly erroneous for the court to conclude that those two violations, by themselves, resulted in a reasonable rental value of zero. *Bedell v. Inver Housing, Inc.*, 506 A.2d 202, 204-05 (D.C. 1986) (affirming decision granting full rent abatement for an apartment on the basis that it was uninhabitable due to a lack of heat from December through April); *see also Chibs*, 960 A.2d at 589-90 (noting that "[c]redible evidence of housing code violations alone can support a finding that the housing had no reasonable rental value," and affirming a total abatement based on "electrical deficiencies, ineffective heating, rotting structures, basement flooding, and rodent infestation"); *Bernstein*, 649 A.2d at 1072 (finding total abatement permissible for "persistent and extreme problems with leaking and falling ceilings and rodent infestation").

Ms. Smith does not seriously assert that the unit was habitable. Instead, she argues that the fact that the unit *was* uninhabitable gives her the right to evict Ms. Ventura and Mr. Enamorado. Smith Brief at 12-15. That argument is wrong as a matter of law. A lease of an

uninhabitable unit may be void, *see* 14 DCMR § 302.2 ("After the beginning of the tenancy, if the habitation becomes unsafe or unsanitary due to violations of [the Housing Code] . . . the lease or rental agreement for the habitation shall be rendered void . . . ."), but that does not provide a landlord the legal basis to evict the affected tenant. Rather, under that circumstance, the tenant may continue living in the unit as a tenant at sufferance, *Slade*, 271 A.2d at 416, and can only be evicted for enumerated bases limited to nonpayment of rent and violations of the lease, 14 DCMR §§ 4300-4301. Indeed, public policy would not be served if the law were as Ms. Smith asserts and any landlord wishing to evict a tenant could circumvent District law limiting the reasons for eviction by the simple expedient of rendering the unit uninhabitable. *See Javins*, 428 F.2d at 1078-80.

III. MS. SMITH'S OTHER CLAIMS ARE WITHOUT MERIT.

A. Ms. Smith is Not Subject to Slavery.

Ms. Smith claims that the Superior Court's dismissal of her complaint subjected her to slavery as prohibited by the Thirteenth Amendment. Smith Brief at 11-15. This argument is without merit. Ms. Smith is not being treated as property. She willingly decided to obtain money by leasing residential property within the District of Columbia. The law places certain legal obligations on every individual who does so, including the obligation to maintain the habitability of leased units. *See* 14 DCMR §§ 400-899. Even so, Ms. Smith has never been forced to do anything; as a result of her violation of District law, the Superior Court simply refused to provide her with the specific legal relief she sought – a judgment for possession and a writ of restitution. Being denied a writ and a judgment is not enslavement. *See Memphis v. Greene*, 451 U.S. 100, 129 (U.S. 1981) ("routine burden of citizenship" does not violate the

Thirteenth Amendment); BLACK'S LAW DICTIONARY 1515 (9th ed. 2009) (slavery is "[a] situation in which one person has absolute power over the life, fortune, and liberty of another").

B. Expiration of the Lease is Not a Ground for Eviction.

Ms. Smith argues that she is entitled to possession of Ms. Ventura and Mr. Enamorado's unit because the lease expired on December 31, 2014. Smith Brief at 15-16. In support, she cites D.C. Code § 42-3210, which provides, "[w]henever a lease for any definite term shall expire, or any tenancy shall be terminated by notice as aforesaid, and the tenant shall fail or refuse to surrender possession of the leased premises, the landlord may bring an action of ejectment to recover possession."

There are two dispositive problems with this argument. First, by its own terms, the lease here does not expire but, instead, includes an initial year-long lease period followed by an indefinite monthly tenancy. Ap. Tab 1, at 6 ("After the expiration of the term of this agreement, if Tenant remains in possession, the tenancy shall be deemed to be a monthly tenancy."); *see Novak v. Cox*, 538 A.2d 747, 748 (D.C. 1988) (lease term providing "that at the expiration of the term, the lease would continue on a month-to-month basis"). Second, the legal provision upon which Ms. Smith relies has been superseded by D.C. Code § 42-3505.01(a), which provides that "so long as the tenant continues to pay the rent to which the housing provider is entitled," "no tenant shall be evicted from a rental unit, notwithstanding the expiration of the tenant's lease or rental agreement." *See Jack Spicer Real Estate, Inc. v. Gassaway*, 353 A.2d 288, 291-92 (D.C. 1976) (Rental Housing Act supersedes what is now codified as D.C. Code § 42-3210); *see also Double H Hous. Corp. v. David*, 947 A.2d 38, 41 (D.C. 2008) ("[S]ection 42-3505.01 guarantees a holdover tenant the opportunity to continue his tenancy on a month-to-month basis as long as he pays the rent.") (emphasis removed). Thus, even if the lease here had been for a fixed term

and that fixed term had expired, Ms. Ventura and Mr. Enamorado would still have a month-to-month tenancy.

C. The Superior Court's Factual Findings are Not Clearly Erroneous.

Ms. Smith repeatedly argues that Ms. Ventura and Mr. Enamorado engaged in "warlike," "belligerent," and destructive behaviors, and that as a result, she was relieved of her "duty to repair" the rented unit. Smith Brief at 9, 16-20, 22-24. It is unclear whether these factual allegations would be relevant, even if they were proven. But they were not proven, and the Superior Court's factual findings in this regard are not clearly erroneous.

The Superior Court correctly found that the evidence did not show that Ms. Ventura or Mr. Enamorado damaged their unit. Ap. Tab 22, at 44 (finding "nothing in the evidence that points to anything the tenants were doing to create the problem"); Ap. Tab 22, at 46 ("If your suspicious have some evidentiary support, I haven't seen that. . . . Court[]s don't make decisions on suspicions. . . . We have to make our decisions on evidence"). Ms. Smith even testified that she only *suspected* Ms. Ventura and Mr. Enamorado engaged in destructive activities. Ap. Tab 22, at 16 ("I don't have any proof"); *id.* ("I believed that they had been pulling it out"); Ap. Tab 22, at 45 ("it's reasonable to infer that they are the cause"); Ap. Tab 22, at 46 ("the Court should be able to infer that the tenant had some sort of responsibility").

D. Ms. Smith Waived Her Meritless Arguments About the Superior Court's Bias.

Ms. Smith argues that the Superior Court was biased because Judge Rankin allegedly accessed information outside the record and "behaved more like the Tenant's trial [c]ounsel." Smith Brief at 26-27. As an initial matter, Ms. Smith waived this allegation of bias by failing to raise it before the Superior Court. *Plummer v. United States*, 43 A.3d 260, 265, 270 (D.C. 2012) (failure to raise disqualification on the basis of bias before trial court waived claim on appeal).

Ms. Smith never sought Judge Rankin's recusal and raises the specter of bias for the first time in her appellate brief. Accordingly her assertion of judicial bias has been waived.

In addition to the obligation to raise disqualification on the basis of bias below, Ms. Smith also has the burden of showing that Judge Rankin should have, in fact, disqualified himself. "The standard for determining whether recusal is required under Canon 3(E)(1) is an objective one, whether an observer could reasonably doubt the judge's ability to act impartially." *In re M.C.*, 8 A.3d 1215, 1222 (D.C. 2010). Ms. Smith's vague assertions fail to meet this high standard.

First, Ms. Smith alleges that the Superior Court was biased because it had access to "information it should not have had," including that Ms. Ventura and Mr. Enamorado had been robbed and that Mr. Enamorado had conducted his own repairs to the rental unit. Smith Brief at 26-27. Importantly, Ms. Smith does not allege that either of these facts had any role in the decision below, and there is no indication that the Superior Court considered these facts in any way. Moreover, Ms. Smith cannot prove that these two facts were truly outside the record, because she failed to provide this Court with the entire record below. For example, the Superior Court held an initial hearing on December 31, 2014, Dkt. No. 14, during which the facts in question could have been discussed, but Ms. Smith has not requested a transcription of that hearing or provided the transcript to this Court. She has therefore failed to demonstrate that the trial judge obtained these facts improperly.

Second, Ms. Smith complains that during her testimony, the Superior Court "kept interrupting" her and "conducted cross examination." Smith Brief at 27. Ms. Smith does not indicate what testimony she would have offered had she not been interrupted, nor does she allege that she suffered any prejudice from these interruptions. *See Haughton v. Byers*, 398 A.2d 18, 20

(D.C. 1979) (judges are imparted with "the duty to intercede in an examination to draw more information from reluctant witnesses . . . who are either inarticulate, less than candid or not adequately interrogated, and to interrogate when it becomes essential to the development of the facts of the case") (internal citations and quotation marks omitted). There is nothing impermissible about the court's questioning of a witness, and such a procedure is particularly appropriate when a pro se litigant testifies. *Bryant v. United States*, 93 A.3d 210, 228 (D.C. 2014); *see* FED. R. EVID. 614(b) ("The court may examine a witness regardless of who calls the witness."). Here, the court's questioning sought to clarify Ms. Smith's testimony in order to "ascertain the truth." *In re T.C.*, 999 A.2d 72, 83 (D.C. 2010). In any event, Ms. Smith cannot demonstrate that the court's questioning prejudiced her. *Bryant*, 93 A.3d at 228.

Third, Ms. Smith alleges that the Superior Court evidenced bias because it "ruled that" her testimony "was unimportant," "ruled against [her] notice to quit" "[b]efore [she] completed her case," and "raised the validity of the notice to quit as a defense." Smith Brief at 27. In fact, the court simply ruled on the case in a manner that Ms. Smith does not like. That is hardly evidence of bias. *Wright v. Mathias*, 128 A.2d 658, 660 (D.C. 1957) ("adverse rulings alone cannot establish bias").

Lastly, Ms. Smith complains that "[t]he Spanish clerk did not keep accurate account of the exhibit numbers as the landlord requested and thus some exhibits got named similar numbers." Smith Brief at 27. Ms. Smith fails to provide any details about this alleged procedural irregularity and how it might have harmed her, much less "substantially swayed" the judgment. *Naccache v. Taylor*, 72 A.3d 149, 163 (D.C. 2013).

CONCLUSION

Based on the foregoing, Ms. Ventura and Mr. Enamorado respectfully request that this court affirm the Superior Court's dismissal of Ms. Smith's complaint.

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 Appellees to be delivered by first-class mail, postage prepaid, this 1st day of July, 2015, to:

Michelle D. Smith
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_____
Paul Perkins