No. 11-CV-1189

DISTRICT OF COLUMBIA COURT OF APPEALS

KAMENKO PAJIC,

Appellant

v.

FOOTE PROPERTIES, L.L.C.,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

BRIEF OF APPELLANT

Julie H. Becker (No. 471080) *
John C. Keeney, Jr. (No. 934307)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161
Facsimile: (202) 727-2137

Counsel for Appellant

* Presenting oral argument

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

The parties to the case are appellant Kamenko Pajic, the defendant/counter-plaintiff below, and appellee Foote Properties, L.L.C., the plaintiff/counter-defendant below.

In the Superior Court, Mr. Pajic was *pro se*. He is represented in this Court by Julie H. Becker and John C. Keeney, Jr., of the Legal Aid Society of the District of Columbia.

In the Superior Court, the Appellee was represented by Laina Lopez and Ankhi Sengupta of the law firm Berliner, Corcoran & Rowe, L.L.P. Appellee is represented in this Court by Ms. Lopez.

No intervenors or amici appeared in the Superior Court.

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the trial court erred in awarding the landlord more than $44,000 in attorney's fees based on a contractual fee-shifting provision that is void and unenforceable under the District's landlord-tenant law.
2. Whether the trial court erred in awarding the landlord damages for unpaid rent on summary judgment where the tenant's sworn statements, in his verified answer and his deposition, placed material facts in dispute on the central issues of the amount of rent he paid and whether any amount owing to the landlord should have been offset by housing code violations.
3. Whether the court erred in dismissing the tenant's counterclaim for breach of the implied warranty of habitability – which alleged water damage, broken air-conditioning, and other problems in his apartment – on the ground that the *pro se* tenant had failed to state a claim on which relief could be granted.

STATEMENT OF THE CASE

This appeal challenges the trial court's entry of summary judgment in favor of Appellee Foote Properties, L.L.C., for $8,200 in unpaid rent and late fees and $44,519.67 in attorney's fees. Foote brought this suit for damages against Appellant Kamenko Pajic after Mr. Pajic vacated Apartment 203 at 4275 Foote Street NE, Washington, D.C. The court entered judgment on the ground that there were no material facts in dispute as to Mr. Pajic's failure to pay rent or his claim that he was entitled to rent credits as a result of substandard housing conditions. The trial court also dismissed Mr. Pajic's counterclaim for breach of the implied warranty of habitability on the ground that he had failed to state a claim on which relief could be granted.

Finally, the trial court awarded attorney's fees based on the fee-shifting provision of the parties' rental contract.

STATEMENT OF FACTS

Mr. Pajic's tenancy and the condition of his unit. Mr. Pajic moved into the Foote Street apartment in May of 2008, with a rent of $1,450. Complaint, ¶¶ 5, 7 (A9). The landlord for the property was Foote Properties L.L.C. *Id.* ¶ 4, 5 (A9).

Shortly after moving in, Mr. Pajic began experiencing problems with his apartment. First, in June 2008, he realized that the air-conditioning in the unit did not work properly, leaving him without adequate ventilation in temperatures at or near 90 degrees. Pajic's Verified Answer and Counterclaim (hereinafter "Answer and Counterclaim"), ¶ 9 (A31-32). Although Mr. Pajic reported the problem to Frank Chambers, the Foote employee responsible for day-to-day management of the property, the problem was not addressed for three weeks. *Id.*; Transcript from Deposition of Kamenko Pajic (hereinafter "Pajic Deposition"), 143:11-21 (A285). During that time, Mr. Pajic had to forego custodial visits with his children, ages eight and six, "because the apartment was [un]inhabitable due to the high temperature." Answer and Counterclaim, ¶ 9 (A31-32).

Around the same time, the unit began to exhibit problems with moisture. In late June or early July 2008, a water leak flooded the living room and bathroom, causing damage to Mr. Pajic's belongings. *Id.* ¶ 10 (A32); Pajic Deposition, 93:11 (A271). The leak recurred several times over the next few days, and the following week, the drywall in the bathroom ceiling began to disintegrate. Answer and Counterclaim, ¶ 10 (A32). The living room drywall suffered similar damage and soon began to emit "a strong unpleasant odor." *Id.* ¶ 13 (A32).

Mr. Pajic alerted Mr. Chambers to the problem, and Chambers took steps to address the situation. *Id.* ¶ 10 (A32); Pajic Deposition, 98:12-99:7 (A272-73). The repair was not effective, however, and the leak recurred in August 2008, damaging more of Mr. Pajic's possessions. Answer and Counterclaim, ¶ 14 (A32-33); Pajic Deposition, 107:11-22 (A279). Although Foote eventually stopped the leak, it never sealed the hole that it had created in the bathroom ceiling to make way for the repairs. Answer and Counterclaim, ¶¶ 10, 13 (A32).

<u>Payment of rent.</u> As a result of these problems in his unit, Mr. Pajic began making reductions in the rent he paid to Foote. Upon moving in, Mr. Pajic had made the following payments: $500 for a damage deposit; $1,030 for the pro-rated rent for May 2008; and a third check for $1,450, representing a "last installment" of rent. Foote's Statement of Material Facts as to Which There is No Genuine Issue, ¶¶ 8-10 (A153-54). On May 30, he wrote another check for $1,450, covering rent for the month of June 2008. *Id.* ¶ 11 (A154).

In July 2008, after the first breakthrough of water, Mr. Pajic paid $1,000 rather than the full rent of $1,450. *Id.* ¶ 12 (A154). The reduction, which Mr. Pajic claimed Mr. Chambers had authorized, was designed to compensate Mr. Pajic for the damage to his belongings resulting from the leak. Answer and Counterclaim, ¶ 10 (A32); Pajic Deposition, 81:1-8 (A261).

Mr. Pajic paid rent in full for the month of August 2008. Complaint, ¶ 11 (A10). In September, following the second leak in his unit, he again reduced his rent to account for the damage, paying $1,250 and withholding $200. *Id.* ¶ 12 (A10). Mr. Pajic contended that Mr. Chambers had authorized this second deduction as well. Answer and Counterclaim, ¶ 14 (A33); Pajic Deposition, 81:21-83:11 (A261-63).

Mr. Pajic did not pay rent in October 2008, relying on the "last installment" he had paid upon moving in to cover the rent for that month. Pajic Deposition, 66:6-16 (A255). In early

November – having received no payment during the previous month – Mr. Chambers approached Mr. Pajic to discuss the rent, indicating that if he did not pay, he would be evicted. Answer and Counterclaim, ¶ 18 (A33-34). In response, Mr. Pajic paid Mr. Chambers $2,900 in cash to cover the rent for November and December 2008. *Id.*; Pajic Deposition, 68:10-20 (A257).

At that point, Mr. Pajic began looking for another apartment and did not make any further payments to Foote. Complaint, ¶ 13 (A10); Answer and Counterclaim, ¶ 21 (A34). He vacated the unit in early March 2009. Foote's Statement of Material Facts as to Which There is No Genuine Issue, ¶ 21 (A156).

Foote's lawsuit for unpaid rent. On July 9, 2010, Foote filed this case in the trial court, seeking $11,500 in rent and late fees from Mr. Pajic. Complaint for Damages, ¶ 27 (A13). Foote's complaint also sought attorney's fees, relying on Paragraph 23 of the lease between the parties. *Id.* ¶¶ 21-22 (A12-13). That lease provision provided as follows:

> **ATTORNEYS' FEES**. Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee.

Lease, ¶ 23 (attached as Exhibit 1 to Foote's Complaint) (A20). Foote contended that because Mr. Pajic failed to pay rent, Foote had been forced to employ counsel and that pursuant to the lease agreement, Mr. Pajic was responsible for those legal fees. Complaint, ¶¶ 21-22 (A12-13).

Mr. Pajic, acting *pro se*, filed a verified answer and counterclaim on August 4, 2010. In his sworn pleading, Mr. Pajic averred that: 1) contrary to Foote's contention, he had in fact paid rent for October through December 2008; and 2) Mr. Chambers had authorized a rent credit for July 2008 as a result of the leak in his unit, and thus the $1,000 he paid was all that was due. Answer and Counterclaim, ¶¶ 10, 17-18 (A32-34). Accordingly, he contended, he did not owe the rent claimed in Foote's complaint. Mr. Pajic's counterclaim also detailed the deficiencies in

his apartment, including the problems with air-conditioning and water damage, and the difficulties he had experienced as a result of these defects. *Id.* ¶¶ 9-11, 13-14 (A31-33). He asserted that these conditions constituted a breach of his rental contract with Foote and that he was therefore entitled to recovery from the landlord. *Id.* ¶ 33 (A36-37).

The motion for summary judgment. The case proceeded through discovery, and on February 3, 2011, Foote moved for summary judgment against Mr. Pajic. In its motion, Foote reduced its demand for unpaid rent to $8,200, representing $450 for July 2008; $1,450 for October 2008 through February 2009; and $500 in late fees. Memorandum of Points and Authorities in Support of Foote's Motion for Summary Judgment (hereinafter "Motion for Summary Judgment"), at 11-15 (A142-47). Foote contended that there was no material fact in dispute as to Mr. Pajic's failure to pay these amounts. As to the alleged rent credit for July 2008, it submitted a declaration from Mr. Chambers, stating that he had "never authorized any rent credit for Pajic, in any amount for any reason for any period, including for the month of July 2008." Declaration of Frank Chambers, ¶ 22 (A319).

For the months of November and December 2008 – the payments Mr. Pajic claimed to have made in cash – Mr. Chambers denied having received any such funds and stated that Foote had a policy of not accepting cash payments. *Id.* ¶ 21 (A318-19). Relying on this declaration, together with the lack of any written documentation from Mr. Pajic of these cash transactions, Foote argued that there was no dispute that Mr. Pajic had failed to pay rent for these months, and that his claim to the contrary was unsupported and simply "not credible." Motion for Summary Judgment, at 15 (A146).

Foote also contended that there was no material fact in dispute as to Mr. Pajic's failure to pay rent for October 2008. *Id.* at 14 (A145). In making this claim, Foote did not address Mr.

Pajic's contention that the extra month of rent he paid upon moving in was meant to cover the rent for October – in essence, that he had paid October's rent in advance, in May 2008. Foote did acknowledge holding the $500 deposit Mr. Pajic had made upon moving in, and it conceded that the claim for $8,200 should be reduced by this amount. *Id.* at 12 (A143).

Regarding the conditions of the apartment, Foote argued that Mr. Pajic's account of housing deficiencies was exaggerated and/or unsupported by the evidence. Through declarations of its managers, it claimed that although there had indeed been a leak in the unit in the summer of 2008, the leak was minor and "did not cause a flood." Statement of Material Facts to Which there is No Genuine Issue, ¶ 25 (citing Declaration of Frank Chambers, ¶¶ 12-13, and Declaration of Andre Logan, ¶¶ 7, 9) (A156). Foote's witnesses also contested the size of the hole in Mr. Pajic's ceiling. *Id.*

Finally, Foote argued that it was entitled to summary judgment on its fee claim. It claimed there was "no dispute that, pursuant to paragraph 23 of the Lease, in the event that it became necessary for Foote to employ an attorney to enforce any of the conditions or covenants in the Lease, including the collection of rental payments, Pajic agreed to pay all expenses so incurred, including all reasonable attorney's fees. . . . There is also no dispute that Foote has employed the undersigned attorneys to litigate this matter and that Foote has incurred substantial legal fees." Motion for Summary Judgment, at 16 (citing Lease, ¶ 23) (A147). Foote claimed that its fees to date totaled $10,369. *Id.*

Mr. Pajic filed an opposition to Foote's motion for summary judgment. A350. In his opposition, Mr. Pajic contested the amount due, alleging that 1) Mr. Chambers had authorized a rent credit for July 2008 based on the water damage; 2) he had paid rent in cash for November and December 2008; and 3) Foote's alleged damages did not account for the "last installment"

payment of $1,450 or the $500 "damage deposit" that he had paid upon moving in.[1] Opposition to Motion for Summary Judgment, at 8-10 (A357-59). He also contended that the rent for the unit should be reduced due to the condition of the unit. *Id.* at 8-9, 12-19 (A357-58, 361-68). Responding to Foote's argument that he lacked evidence of these housing conditions, Mr. Pajic explained that he had photographs of the damaged ceiling on his computer, but that the storage disk had been corrupted and he had thus been unable to retrieve this documentary evidence. *Id.* at 23-24 (A372-73).

<u>The trial court's ruling.</u> The trial court (Josey-Herring, J.) held a hearing on Foote's motion for summary judgment on May 26, 2011. The court received argument from Foote's counsel and from Mr. Pajic, who continued to represent himself. At the conclusion of the hearing, the court ruled orally that Foote was entitled to judgment on its claim for unpaid rent. Transcript of May 26, 2011 hearing, at 31-33 (A475-77). The court acknowledged that Mr. Pajic contested the amount due, but found that his contentions were "not supported by competent evidence." Tr. at 34 (A478). The court also dismissed Mr. Pajic's counterclaims under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, holding that he had failed to state a claim on which relief could be granted. Tr. at 40-41 (A484-85).

The trial court also ruled that Foote was entitled to judgment on its claim for attorney's fees, based on Paragraph 23 of the parties' lease. Tr. at 30 (A474). However, because there was "a dispute as to the reasonableness of the attorneys' fees," the court directed Foote to file a supplemental memorandum justifying its claim for over $44,000 in legal bills. Tr. at 32 (A476).

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[1] The record is not clear as to whether Pajic intended the "last installment" of rent to cover the month of October 2008 or January 2009. *See* Answer and Counterclaim, ¶¶ 17, 21 (A33-34) (alleging that Pajic paid in cash in October 2008 and agreed with Chambers to apply the last installment to January 2009); Opposition to Motion for Summary Judgment, at 9 (A358) (same); Pajic Deposition, 66:10-67:1 (A255-56) (stating that the last installment was applied toward October 2008).

Foote submitted its memorandum on June 24, 2011, and Mr. Pajic filed an opposition on June 30, 2011. (A487, A504.)

On August 18, 2011, the trial court issued a written order memorializing its oral ruling on summary judgment and its dismissal of the counterclaims. Order, August 18, 2011 (A510). The court held that in opposing Foote's motion, Mr. Pajic had "proffered no evidence that would be admissible at trial demonstrating that a material fact remained genuinely in dispute with respect to his claims of alleged rent credits and cash payments." *Id.* at 4 (A513). Therefore, Foote was entitled to judgment on its full rent claim of $8,200. The court also found that there was no factual dispute as to "the obligation of Defendant to pay the attorneys fees and costs associated with the instant action pursuant to the lease agreement." *Id.* at 4-5 (A513-14). Finally, the court dismissed Mr. Pajic's counterclaims on the ground that he had had neither "allege[d] the breach of any cognizable duty owed to Defendant by Plaintiff nor set[] forth money damages suffered by Defendant as a result of any such breach." *Id.* at 6 (A515).

In a separate order, the court also granted Foote's fee request in full. Beginning from the premise that a contractual fee-shifting provision – like a statute or a finding of bad faith – was sufficient to justify a fee award, the court concluded that the amount Foote sought was reasonable under the circumstances of this case. The court explained that Foote had been required "to contend with three counterclaims that had no basis in the evidence" and that Mr. Pajic had caused delays and additional work through his actions in responding to discovery and to Foote's filings. Second Order, August 18, 2011, at 3 (A520). Therefore, the court found that while the fee request was sizable, it was nonetheless "reasonable in light of the way this litigation was conducted." *Id.*

Based on these two rulings, the trial court entered judgment in Foote's favor for $8,200 in unpaid rent and $44,519.67 in attorney's fees. Order of Judgment (A522). This appeal followed.[2]

SUMMARY OF THE ARGUMENT

The trial court's judgment for Foote in the amount of $52,719.67 rests on three separate legal errors, each of which merits reversal. The trial court granted summary judgment in Foote's favor despite the existence of disputed material facts in the record; it erroneously concluded that Mr. Pajic's counterclaim failed to state a claim on which relief could be granted; and it awarded Foote over $44,000 in attorney's fees based on an illegal fee-shifting provision in the lease.

This Court reviews both a grant of summary judgment and a dismissal under Superior Court Rule 12(b)(6) *de novo*. *See Han v. Southeast Acad. of Scholastic Excellence Pub. Charter Sch.*, 32 A.3d 413, 416 (D.C. 2011) (summary judgment); *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 572 (D.C. 2011) (motion to dismiss). Foote's entitlement to attorney's fees under D.C. law is also a question of law; because Mr. Pajic did not preserve this question below, however, this Court must consider whether "the interests of justice" warrant discretionary review. *District of Columbia v. Helen Dwight Reed Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001). For the reasons set forth below, they do.

1. The fee award in this case rests exclusively on the fee-shifting clause of the parties' lease. That lease provision is illegal under the District of Columbia's housing code, which expressly prohibits lease terms that purport to make the tenant responsible for paying the owner's legal fees. 14 DCMR § 304.4. The code provides that any such clause in a residential lease

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[2] Foote moved this Court for summary affirmance on October 28, 2011. Mr. Pajic filed an opposition, and Foote filed a reply. On February 6, 2012, this Court denied the motion for summary affirmance and directed the parties to submit briefs in this case.

"shall be void and unenforceable." *Id.* § 304.1. The ban on fee-shifting, like other protections in the housing code, codifies the long-recognized principles that 1) tenants generally are not in a position to negotiate the terms of their rental contracts; and 2) the prospect of attorney's fees would deter tenants from enforcing the housing code or otherwise exercising their rights.

The prohibition on fee-shifting terms in the lease precludes Foote from collecting attorney's fees in this case. None of Foote's proposed limitations on Section 304.4 – that it only applies in eviction actions, or does not apply to "conditional" fee-shifting clauses – finds any support in the text of the regulation, the policies underlying it, or the law regarding attorney's fees more generally. Because the trial court's error in awarding fees is plain from the record, and has ruinous financial consequences for Mr. Pajic, this Court should exercise its discretion to review the issue and to reverse.

2. In awarding summary judgment, the trial court failed to recognize disputed material facts in the record regarding Foote's claim for rent and Mr. Pajic's defenses thereto. The court disregarded the statements in Mr. Pajic's verified answer and counterclaim, which "is tantamount to an affidavit" for purposes of raising facts sufficient to defeat summary judgment. *Raskauskas v. Temple Realty Co.*, 589 A.2d 17, 26 (D.C. 1991) (citation omitted). Mr. Pajic's answer and his deposition testimony both averred that he had paid much of the rent Foote claimed was owing; that Foote had agreed to certain rent credits as a result of water damage in his apartment; and that Foote had failed to address other problems in the unit and Mr. Pajic therefore was entitled to a reduction in rent. Foote, through declarations of its employees, denied each of these claims. The trial court weighed these competing evidentiary presentations – which turned almost exclusively on the witnesses' respective credibility – and resolved the dispute in Foote's favor. That decision was in error.

3. The trial court improperly concluded that Mr. Pajic's counterclaim for breach of contract failed to state a claim for relief because it did not allege the breach of "any cognizable duty" by Foote or set forth the damages he had suffered as a result. But Mr. Pajic's counterclaim – which alleged that Foote had failed to make timely repairs to his air-conditioning, plumbing, and a hole in his ceiling – plainly stated a claim for breach of the implied warranty of habitability. *See Javins v. First National Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir. 1970). Mr. Pajic was not required to offer more detailed allegations, nor was he obligated to plead specific damages resulting from Foote's breach of the warranty. His *pro se* counterclaim, as filed, was more than sufficient to set forth "a claim to relief that was plausible on its face." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (citations omitted). The trial court consequently erred in dismissing it.

ARGUMENT

I. THE COURT SHOULD REVERSE THE AWARD OF ATTORNEY'S FEES AGAINST MR. PAJIC.

At the conclusion of this case, the court below awarded $44,519 in attorney's fees to Foote for prosecuting this action against Mr. Pajic. The court based the award on the parties' lease, which provided: "Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee." Lease, ¶ 23 (A20). The court concluded that this lease provision unequivocally entitled Foote to legal fees, and that the amount the landlord sought was reasonable. Order Granting Summary Judgment, August 18, 2011, at 4-5 (A513-14); Order Granting Attorney's Fees, August 18, 2011, at 3 (A520).

As more fully explained below, the award of attorney's fees was erroneous in its entirety. Under D.C. law, a landlord may not enforce lease terms that purport to make the tenant responsible for legal fees. *See* 14 DCMR §§ 301.1, 304.4. Permitting Foote to collect those fees from Mr. Pajic, in spite of the regulatory prohibition, was plain error and warrants reversal.

A. The lease provision providing for attorney's fees is void and unenforceable.

1. <u>D.C. law prohibits any lease term that shifts the landlord's attorney's fees to the tenant</u>.

The trial court based its fee award on a lease provision that is invalid under the plain terms of the District of Columbia housing code. 14 DCMR § 304.4 provides that: "[n]o owner shall place (or cause to be placed) in a lease or rental agreement a provision . . . requiring that the tenant pay the owner's court costs or legal fees." Further, "any provision of any lease or agreement contrary to" this rule "shall be void and unenforceable." *Id.* § 304.1. These regulations, including the ban on fee-shifting, date back to 1955. *Canada v. Management Partnership, Inc.*, 618 A.2d 715, 719 n.13 (D.C. 1993); *Javins v. First National Realty*, 428 F.2d 1071, 1080, 138 U.S. App. D.C. 138 (D.C. Cir. 1970); *see* D.C. Code § 47-2828(a) (authorizing regulation of rental housing).[3]

Courts do not enforce contract terms, like the fee-shifting provision in Foote's lease, that are contrary to law. *See* Restatement (Second) of Contracts, § 178, at 1 & cmt. (a) (contract term is unenforceable if a statute, local ordinance or administrative rule declares it so); *Williston on Contracts* (4th Ed.), § 19:29; *Miller v. Peoples Contractors, Ltd.*, 257 A.2d 476 (D.C. 1969) (refusing, based on regulations derived from D.C. Code § 47-2828(d), to enforce a home

[3] A near-identical provision appears in the Uniform Residential Landlord and Tenant Act, which more than 20 states have adopted, and in several other landlord-tenant codes. Uniform Residential Landlord and Tenant Act, § 1.403 (amended 1974); *see, e.g.,* Del. Code Ann. Tit. 25, § 5111 (2012); Chicago, Ill. Code of Ordinances § 5-12-140 (2011); Kan. Stat. Ann. § 58-2547 (2011); Mont. Code Ann. 70-24-202 (2011); Wis. Adm. Code ATCP § 134.08 (2012).

improvement contract by an unlicensed contractor). In the housing context, this Court, and the D.C. Circuit before it, have long looked to the District's "housing code" – *i.e.*, the housing regulations set forth in DCMR Title 14, including 14 DCMR § 304.1 – in deciding when and how to enforce residential lease provisions. In *Brown v. Southall Realty*, 237 A.2d 834 (D.C. 1968), this Court overturned a judgment for possession based on non-payment of rent on the ground that violations of the D.C. housing regulations rendered the lease void and unenforceable. In *Javins v. First National Realty*, 428 F.2d 1071 (D.C. Cir. 1970), the D.C. Circuit relied on *Brown* to hold that violations of the same regulations constituted a breach of the lease and provided a defense to liability for non-payment of rent. And even before *Javins*, the Court relied on the same D.C. housing regulations to impose on landlords a duty to repair defective conditions. *See Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943 (D.C. Cir. 1960); *Kanelos v. Ketler*, 406 F.2d 951 (D.C. Cir. 1968).

Consequently, there can be no dispute that residential leases in the District of Columbia must conform to the requirements of the housing regulations, including the prohibition of terms that require tenants to pay the landlord's legal fees.[4] The principle underlying these rules is the need to protect parties who, due to great inequality in bargaining power, cannot meaningfully negotiate the terms of their rental contracts. *See Javins*, 428 F.2d at 1079 (noting that the use of "standardized form leases," among other factors, means "that landlords place tenants in a take it or leave it situation"); *cf. Simons v. Federal Bar Bldg. Corp.*, 275 A.2d 545, 552 (D.C. 1971) (finding that a contractual fee-shifting provision did not violate public policy where the

[4] Aside from the fee-shifting prohibition in § 304.4, the housing regulations bar a number of other exculpatory lease terms, including clauses waiving the right to a jury trial, authorizing a third party to confess judgment, or relieving the landlord of liability for negligence. *See* 14 DCMR §§ 304.3, 304.4.

commercial tenant, "an attorney, signed a lease after a considerable period of negotiation, the terms of which were neither hidden nor deceptive").

It continues to be true, as in *Javins*, that residential leases in the District of Columbia are contracts of adhesion imposed by landlords. In this context, if fee-shifting terms were enforceable against tenants, then every landlord would insist on such lease provisions – and would use them to chill tenants from withholding rent or taking other legal action to force repairs. This is so because for most tenants, the risk of thousands of dollars in fee liability would outweigh any benefit they might gain from enforcing the housing code. By removing the threat of a crippling fee award, Section 304.4 eliminates that deterrent to tenants' exercise of their legal rights.

2. The fee-shifting prohibition applies squarely to this case.

Here, the trial court's award of attorneys' fees rested entirely on the fee-shifting clause of the parties' lease. Under Section 304.4, that provision is unenforceable. Although the regulation does recognize the court's authority to assess attorney's fees against a tenant "in appropriate circumstances," Foote did not contend – and the trial court did not find – that the fees in this case were justified as a matter of the court's inherent powers. *See McClintic v. McClintic*, No. 10-FM-933, slip op. at 13 n.4 (D.C. March 22, 2012) (declining to consider whether a fee award not authorized by statute could be justified as an exercise of inherent powers, because neither the party seeking fees nor the trial court relied on that basis for the award). Rather, the landlord's request for fees was based exclusively on the parties' lease, and the trial court's grant of summary judgment on the fee question rested on that contract provision and not on any other basis. Order Granting Summary Judgment, Aug. 18, 2011, at 4-5 (A513-14). That was clear error.

On appeal, Foote now contends that the prohibition in Section 304.4 applies only to attorney's fees incurred in a suit for possession, and not to a post-tenancy rent claim such as this one. *See* Foote's Reply to Opposition to Motion for Summary Affirmance, at 2. There is no basis for this restrictive reading of the regulation. Section 304.1 makes prohibited lease provisions "void and unenforceable" regardless of the procedural context. The language of the rule is "unambiguous," and the court "must give effect to its plain meaning." *BSA 77 P St. LLC v. Hawkins*, 983 A.2d 988, 995 (D.C. 2009); *see James Parreco & Son v. District of Columbia Rental Housing Comm'n.*, 567 A.2d 43, 46 (D.C. 1989).[5]

Even if the language of the regulation were less clear, Foote's proposed construction still would be without merit. The public policy concerns that underlie the rule – removing disincentives to tenants' enforcement of their legal rights – apply no less in this post-tenancy action for rent than they do in the eviction context. There is no reason that a tenant who withholds rent and then moves out should face liability for fees where a similarly situated tenant, who remains in place to defend a suit for eviction, is not. Moreover, construing the rule this way would encourage landlords to split their lawsuits for possession and rent whenever possible, to the detriment of judicial efficiency.

Foote further contends that, assuming the regulation applies in a post-tenancy case such as this one, the lease provision at issue here is nonetheless valid because it is "conditional" and not "absolute." Foote's Reply to Opposition to Motion for Summary Affirmance, at 3. For this proposition, the landlord relies on *Canada v. Management Partnership*, 618 A.2d 715 (D.C.

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[5] Foote's sole authority for its proposed construction of the regulation is a hornbook written by the late Kenneth Loewinger. *See* Foote's Reply to Opposition to Motion for Summary Affirmance, at 2 (citing Kenneth J. Loewinger & R.J. Turner, D.C. Landlord-Tenant Law § 1.2 (1986)). The hornbook itself includes no support for the proposition. Moreover, Loewinger, a leading advocate for landlords in the District of Columbia until his death, was hardly a neutral authority on the interpretation of the District's landlord-tenant laws.

1993). Foote's reading of *Canada*, however, is misguided. The Court's decision in *Canada* did not purport to exempt "conditional" fee-shifting provisions from the scope of Section 304.4. Rather, the case turned on a feature of Small Claims Branch jurisdiction, which permits fee awards only where the parties' contract explicitly provides for them as a matter of right. *Id.* at 719 (citing Sup. Ct. R. Civ. Pro. (SC) 19). Because the landlord in *Canada* argued that the lease provision created only a conditional rather than an absolute right to recover legal fees, the Court held that the lease could not justify fees in Small Claims Court – making it unnecessary to consider whether the lease provision was or was not otherwise enforceable under Section 304.4. In short, the landlord's own argument in *Canada* doomed the fee claim, whether the landlord correctly characterized the fee provision or not. *See id.*

Nonetheless, Foote now extends the landlord's argument in *Canada* to argue that Section 304.4 is inapplicable here as well, because the lease clause in this case does not "require" the tenant to pay the landlord's legal fees. *See* 14 DCMR § 304.4 (prohibiting a lease provision "requiring that the tenant pay the owner's court costs or legal fees"). Foote's argument has two parts, neither of which has merit.

First, Foote contends that the lease provision "is conditional, not absolute, because tenant 'agrees' to pay landlord's 'expenses so incurred' only 'should it become necessary for Landlord to employ an attorney.'" Foote's Reply to Opposition to Motion for Summary Affirmance, at 3. In other words, Foote suggests that the lease does not "require" the tenant to pay attorney's fees because it applies only if the landlord hires an attorney; if the landlord hires no lawyer, the tenant pays no fees. But Foote's definition of "conditional" would encompass all fee-shifting terms, because *any* fee-shifting provision is necessarily limited to those situations in which fees are incurred. To read Section 304.4 as Foote suggests – and hold that it does not apply if the lease

"conditions" payment of fees on the landlord's hiring of a lawyer – would nullify the regulation entirely.

Foote also contends that the lease provision does not "require" Mr. Pajic to pay legal fees, in violation of Section 304.4, because it only obligates him to pay a "reasonable" fee. Foote's Reply to Opposition to Motion for Summary Affirmance, at 3 ("Had the trial court determined that the attorney's fees sought were *not* 'reasonable,' Foote would not have been entitled to them.") (emphasis in original). Here again, there is nothing in the text of the regulation or in the underlying policy that would exempt from the prohibition a term shifting "reasonable" fees to the tenant. Under Foote's construction, the only effect of the regulation would be to prevent unreasonable fee awards. But the limitation to awarding "reasonable" fees is implicit in any fee-shifting clause. A contract provision shifting "reasonable" fees is still a fee-shifting provision. Furthermore, the purpose of the rule is to preclude any fee-shifting, because even "reasonable" fees – as the $44,519 award in this case illustrates – may pose a drastic financial deterrent to tenants' exercise of their rights.

Foote's argument is premised on the notion that to the extent the trial court disallowed any of its fees as unreasonable, Mr. Pajic would not have been obligated to pay them. Reply to Motion for Summary Affirmance, at 3. While that is true, it is irrelevant to the question under Section 304.4, which is whether the contract requires him to pay fees at all. Moreover, this Court has already rejected the proposition that a contractual fee term providing for "reasonable" fees is in any way conditional. In *Concord Enterprises v. Binder*, 710 A.2d 219 (D.C. 1998), the Court reversed a decision denying fees where the contract provided – much like the one in this case – that the debtor would pay "all costs and expenses incurred in respect [to the debt obligation], including *reasonable* counsel fees incurred or paid." 710 A.2d at 225 (emphasis

added). The court held that unless the contract was void for some other reason, the fee provision must be enforced, with the trial court to determine only whether the claimed fees were reasonable and not whether they were awardable in the first instance. *Id.*; *see Central Fidelity Bank v. McClellan*, 563 A.2d 358, 360 (D.C. 1989) (finding that the question of reasonable fees, which was in the court's discretion, was separate from the contractual entitlement to fees at all); *Canada*, 618 A.2d at 719 (distinguishing the issue of whether the contract provides for fees from the trial court's discretion to determine reasonableness); *International Comm'n on English in Liturgy v. Schwartz*, 573 A.2d 1303, 1306 (D.C. 1990) (same).

Contrary to Foote's portrayal, the "reasonableness" limitation in the lease does not create uncertainty as to Mr. Pajic's obligation to pay Foote's attorney's fees. To the contrary, the lease is clear as to the basic fee-shifting question: Whatever the reasonable fees are determined to be, Mr. Pajic must pay them. Lease, ¶ 23 (A520). Nor, in the trial court, did Foote ever treat the fee-shifting provision as "conditional"; instead, it argued that its entitlement to fees under the lease was beyond dispute, with the only remaining question being the size of the award. Motion for Summary Judgment, at 16 (A147); Tr. at 8 (A452). The trial court agreed, concluding that because the contract was clear, "there is no material issue of disputed fact as to the obligation of Defendant to pay the attorney's fees and costs associated with the instant action pursuant to the lease agreement." Order Granting Summary Judgment, Aug. 18, 2011, at 4-5 (A513-14).

There is no basis for Foote's contention here that the "reasonableness" limitation in the parties' lease means that the provision does not "requir[e] the tenant to pay the owner's . . . legal fees." To the contrary, that is exactly what the lease in this case unlawfully requires. The trial court's fee award was based exclusively on this invalid lease provision, and for that reason, it cannot survive appeal.

B. The award of attorney's fees is subject to reversal on appeal.

The trial court's error in awarding fees against Mr. Pajic was sufficiently plain – and sufficiently harmful – that it should be reversed despite his failure to raise the legal issue below. Although appellate review generally "is limited to issues that were properly preserved," this Court has recognized that it may be appropriate to deviate from that rule in "'exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record.'" *Fairman v. District of Columbia*, 934 A.2d 438, 445-46 (D.C. 2007) (quoting *Williams v. Gerstenfeld*, 514 A.2d 1172, 1177 (D.C. 1986)). The waiver rule is "one of discretion rather than jurisdiction," preserving the Court's ability to rule on issues not raised below if the interests of justice so require. *District of Columbia v. Helen Dwight Reed Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001); *see McClintic*, slip op. 5 n.1 (reviewing the trial court's reliance on statutory authority to award fees despite the lack of any objection below to the statute's applicability).

In particular, this Court may review a question raised for the first time on appeal if the issue is purely legal rather than factual. *See id.* This is so because the reasons for requiring preservation of issues in the trial court – the need for full development of the facts, and a desire to avoid piecemeal resolution of cases – do not come into play when the dispute concerns a question of law. *See Miller v. Avirom*, 384 F.2d 319, 321-22, 127 U.S. App. D.C. 367 (D.C. Cir. 1967). Because the analysis of such issues is essentially the same at the trial and appellate levels, they are appropriate for resolution on appeal even if the trial court had no opportunity to address them. *See Fairman*, 934 A.2d at 446 ("This argument appears to raise a pure question of law, and no further factual record is required to address it. . . . Therefore, we will consider the argument.") (citation omitted); *In re A.G.*, 900 A.2d 677, 679-680 (D.C. 2006) (electing to address a legal "issue of first impression [that] has been briefed and involves important legal rights . . . notwithstanding appellant's failure to raise any objection before the trial court"); *Helen*

Dwight Reed, 766 A.2d at 33 n.3 (granting review of a legal issue not preserved below because "the factual record is complete and a remand for further factual development would serve no purpose, the issue has been fully briefed, and no party will be unfairly prejudiced").

Applying these principles, the Court should reverse the grant of attorney's fees against Mr. Pajic under 14 DCMR § 304.4 despite his failure to raise this legal issue below. The applicability of the regulation to this case is a legal question that requires no additional factual inquiry; had Mr. Pajic made the argument to the trial court – which he did not because, as a *pro se* defendant, he was unaware of it – the court would have undertaken the same analysis that arises on this appeal. And while this Court has held that a *pro se* litigant "can expect no special treatment" from the court, it has also noted that strict application of procedural default rules, unrelated to the merits of the action, may be particularly inappropriate in cases involving unrepresented parties. *See, e.g.*, *Berkley v. D.C. Transit, Inc.*, 950 A.2d 749, 756-57 & n.11 (D.C. 2008) (citing *Macleod v. Georgetown Univ Med. Ctr*, 736 A.2d 977, 979 (D.C. 1999)); *Goodman v. District of Columbia Rental Housing Comm'n*, 573 A.2d 1293, 1299 (D.C. 1990).

Finally, the trial court's ruling works a "manifest injustice" against Mr. Pajic. The judgment, if permitted to stand, would allow Foote to collect over $44,000 against an unsophisticated defendant in clear violation of D.C. law. The court's error is plain from the record and would have devastating financial consequences for Mr. Pajic. Under these circumstances, Mr. Pajic's failure to preserve the issue should not preclude its consideration on appeal.

II. THE RECORD IN THIS CASE DID NOT ENTITLE THE LANDLORD TO SUMMARY JUDGMENT.

The court below erroneously granted summary judgment despite several genuine factual disputes apparent from the record.[6] The trial court entered judgment for Foote in the amount of $8,200, finding that Mr. Pajic had "proffered no evidence that would be admissible at trial demonstrating that a material fact remained genuinely in dispute with respect to his claims of alleged rent credits and cash payments." Order, August 18, 2011, at 4 (A513). In so ruling, the trial court failed to account for the issues of material fact set forth in Mr. Pajic's Verified Answer and Counterclaim – which as a sworn pleading was sufficient to place facts at issue – and elsewhere in the record of the case. The court improperly resolved credibility questions relating to Mr. Pajic's rent payments and to the condition of his apartment, which, under Mr. Pajic's version of the facts, would have entitled him to a reduction in rent.

The trial court's ruling was in error. First, the court failed to recognize that in defending against summary judgment, the nonmoving party may rely on a verified pleading, which, as a sworn statement, "'is tantamount to an affidavit' and may therefore be sufficient to raise a genuine issue of fact." *Raskauskas v. Temple Realty Co.*, 589 A.2d 17, 26 (D.C. 1991) (quoting *Thompson v. Seton Invs.*, 533 A.2d 1255, 1257 (D.C. 1987)); *see also United States v. F.C.C.*, 652 F.2d 72, 129 (D.C. Cir. 1980) (en banc); 5A Charles Alan Wright & Arthur R. Miller,

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[6] As this Court has recognized repeatedly on *de novo* review, summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Super. Ct. Civ. R. 56(c). In evaluating a motion for summary judgment, the trial court must view the facts in the light most favorable to the non-moving party. *See Phillips v. Fujitec Am., Inc.*, 3 A.3d 324, 327 (D.C. 2010). The court must undertake an independent review of the record, and must examine "the pleadings and other papers to determine whether the moving party is legally entitled to judgment." *Milton Properties, Inc. v. Newby*, 456 A.2d 349, 354 (D.C. 1983) (citations omitted). "[T]he papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Fry v. Diamond Constr., Inc.*, 659 A.2d 241, 246 (D.C. 1995) (internal quotation marks and citations omitted).

Federal Practice and Procedure § 1339, at 152 n.14 (2d ed. 1992) (citing *F.C.C.*, 652 F.2d at 129; *Kahn v. Garanziani*, 411 F.2d 210 (6th Cir. 1969); *Fletcher v. Norfolk Newspapers, Inc.*, 239 F.2d 169 (4th Cir. 1956)). As discussed below, the Verified Answer and Counterclaim in this case set forth a number of facts challenging Foote's right to recovery, none of which the trial court addressed in analyzing whether summary judgment was warranted.

Second, the trial court improperly granted judgment where the material facts turned largely, if not exclusively, on credibility. The Court has characterized summary judgment as "an extreme remedy," to be imposed "only where it is quite clear what the truth is." *Kuder v. National Bank*, 497 A.2d 1105, 1106 (D.C. 1988) (citations and internal quotation marks omitted). In particular, where the case rests on witnesses' differing versions of events in question, summary judgment is not appropriate. "On summary judgment, the court does not make credibility determinations or weigh the evidence." *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005); *see, e.g., In Re Estate of Walker*, 890 A.2d 216, 225 (D.C. 2006) (reversing grant of summary judgment because the case "involves the credibility of witnesses, and resolution of credibility issues is within the province of the trier of facts"); *Kuder*, 497 A.2d at 1107 (reversing grant of summary judgment where the findings of fact depended on whether a witness's testimony was credible); *Warren v. Medlantic Health Group, Inc.*, 936 A.2d 733, 741 (D.C. 2007) (reversing summary judgment because, among other reasons, the trial judge "resolved any question of credibility in favor of" one witness and "implicitly rejected" the testimony of another). If "contending testimony" creates a dispute as to a material fact, the question of which witness's version is true is "a matter of credibility . . . that is for the factfinder to resolve." *Samm v. Martin*, 940 A.2d 138, 141 (D.C. 2007).

In this case, the record contained a number of factual disputes, all of which turned on Mr. Pajic's credibility versus that of Foote's witnesses, and all of which the trial court resolved in Foote's favor. In particular:

1. <u>Rent payments and application of those payments</u>. Foote contended that Mr. Pajic did not pay any rent at all from October 2008 to February 2009, and paid only partial rent for July 2008. Foote's Statement of Material Facts as To Which There is No Genuine Issue, at ¶¶ 12-18 (A154-55). The trial court accepted this contention and found that there was "no genuine issue of material fact" as to Mr. Pajic's debt for those months, which amounted to $8,200 in rent and late fees. Order Granting Summary Judgment, August 18, 2011, at 4 (A513).

Mr. Pajic's Verified Answer and Counterclaim, however, avers that in early November 2008, he provided to Frank Chambers, an employee of Foote Properties, a cash payment of $2,900 to cover rent for November and December 2008. Answer and Counterclaim, ¶ 18 (A33-34). Mr. Pajic also testified to this effect in his deposition. Pajic Deposition, 68:10-20 (A257). Foote, for its part, submitted declarations from Mr. Chambers and another of the property's managers stating that Foote did not accept cash payments and that Mr. Chambers had never taken any such payments from Mr. Pajic. Declaration of Frank Chambers, ¶ 21 (A318-19); Declaration of Nelson Abramson, ¶ 15 (A323). The trial court resolved this testimonial dispute, as a matter of law, in Foote's favor.[7]

[7] Foote made much of Mr. Pajic's lack of any contemporaneous notes or other written records of these cash payments. Motion for Summary Judgment, at 15 (A146). Mr. Pajic informed Foote and the court that he had been unable to locate the checkbook where he thought he had written notes. Opposition to Motion for Summary Judgment, at 30 (A379). While Foote certainly would be entitled to explore this issue in challenging Mr. Pajic's credibility on cross-examination, it does not support the grant of summary judgment against him. *See EDM & Assocs., Inc. v. Gem Cellular*, 597 A.2d 384, 386 n.5 (D.C. 1991) (vacating summary judgment and noting that "attacks on [the plaintiff's] credibility, while perhaps central to any proceedings on remand in the trial court, are . . . irrelevant for present purposes").

Mr. Pajic also averred in his counterclaim that he had paid rent for October 2008 in cash. Answer and Counterclaim, ¶ 17 (A33). In his deposition, he clarified that the rent payment for that month had actually been made in May 2008, when he paid an extra month of rent in advance in the amount of $1,450. Pajic Deposition, 66:10-67:1 (A255-56). And indeed, although Foote denied ever receiving an October payment in cash, it expressly acknowledged having received the following checks from Mr. Pajic on or about May 8, 2008: $500 for a damage deposit; $1,030 for the pro-rated rent for May 2008; and a third check for $1,450, representing a last installment of rent. Statement of Material Facts as to Which There is No Genuine Issue, ¶¶ 8-10 (A153-54). Foote's accounting of its damages did not credit that $1,450 payment to Mr. Pajic and did not explain why, even if the factfinder did not credit Mr. Pajic's testimony regarding cash payments, the "last installment" payment should not be applied toward the money Foote claimed was due. Even if summary judgment in Foote's favor had otherwise been appropriate – which it was not – this error warrants reversal.

In addition, the trial court's judgment for $8,200 fails to account for Mr. Pajic's undisputed "damage deposit" of $500. In its summary judgment motion, Foote conceded that this payment would apply to reduce any judgment for unpaid rent and late fees. Motion for Summary Judgment, at 16) (A147) ("Foote's motion for summary judgment should be granted in Foote's favor, and Foote should be awarded $8,200.00 in compensatory damages, minus a $500.00 damage deposit."). The trial court failed to make this undisputed reduction, instead awarding a monetary judgment for the full amount of $8,200. That too was reversible error.

2. Rent credits. Mr. Pajic averred in his Verified Answer and Counterclaim that after he experienced water damage in his bathroom in June 2008, Mr. Chambers "suggested compensation" for the damage "in the form of a rent reduction from the July rent payment."

Answer and Counterclaim, ¶ 10 (A32). Mr. Pajic also testified to this fact in his deposition. Pajic Deposition, 81:1-8 (A261). Though written declarations, Foote's manager denied having given any such rent credit. Declaration of Frank Chambers, ¶ 22 (A319).

Not only did the trial court err in resolving this credibility dispute against Mr. Pajic, but it also failed to draw appropriate inferences in his favor from the record on this point. Specifically, Mr. Pajic attested in his counterclaim that after a second flood occurred, in August 2008, Foote offered another rent credit of $200, to be deducted from the September rent payment. Answer and Counterclaim, ¶ 14 (A32-33). Mr. Pajic testified that in accordance with this arrangement, he paid $1,250 in rent for that month. Pajic Deposition, 81:21-83:11 (A261-63). Foote acknowledged receiving only $1,250 from Mr. Pajic in September 2008. Complaint, ¶ 12 (A10). However, Foote did not attempt to collect the rest of the September rent in this case, as it presumably would have done if it believed that $200 was still outstanding. Motion for Summary Judgment, at 2 (A133).[8] A reasonable inference from this course of events is that – despite Mr. Chambers's declaration that he "never authorized any rent credit for Pajic, in any amount for any reason for any period" – Foote did, in fact, agree to credit Mr. Pajic $200 for the month of September 2008. And, if that is so, the factfinder might also reasonably infer that despite Chambers's denial, Foote also authorized such a credit for the month of July. Whether that is in fact what happened is a question for the jury in this case; the dispute was not susceptible to resolution on summary judgment.

3. <u>Reduction in rent due to housing code violations</u>. Mr. Pajic also alleged in his verified Answer and Counterclaim that the apartment suffered serious defects that diminished his

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[8] In its Complaint, Foote alleged that $200 was due and owing for September 2008. Complaint, ¶ 12 (A10). Foote withdrew that claim in its summary judgment motion. Motion for Summary Judgment, at 2 n.2 (A133).

use and enjoyment of the premises. If proven, these housing code violations would have reduced the rental value of the unit, and therefore the amount, if any, that he owed to Foote. *See, e.g.*, *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991); *Javins*, 428 F.2d at 1082-83.

In support of a rent reduction, Mr. Pajic attested to a "massive water leak" in the ceiling of his bathroom, which "flooded the entire living room and bathroom" in June or July of 2008 and recurred in August 2008. Answer and Counterclaim, ¶¶ 10, 14 (A32-33). He stated that although Foote eventually addressed the leak, it left behind a large hole in the bathroom ceiling as well as damaged drywall that was "emitting a strong unpleasant odor." *Id.* ¶ 13 (A32). In his deposition, Mr. Pajic testified that the hole in the ceiling was approximately three by three feet and that it appeared to have developed from drywall caving in. Pajic Deposition, at 109:7-11 (A280).

Foote, on the other hand, contended that the leak was not as large as Mr. Pajic claimed and that it "did not cause a flood." Statement of Material Facts as to Which There is No Genuine Issue, ¶ 25 (A156). In support of this contention, Foote relied on declarations from Mr. Chambers and from Andre Logan, the employee who handled repairs to the ceiling. Declaration of Frank Chambers, ¶¶ 12-13 (A317); Declaration of Andre Logan, ¶¶ 7, 9 (A343). As with the dispute regarding rent payments and credits, these dueling declarations do not establish that Foote's version is true and Mr. Pajic's is not.[9] And indeed, Foote's sole argument on this point is that Mr. Pajic "is not credible," and that his allegations "are simply untrue." Motion for

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[9] Foote also suggested that Mr. Pajic had not cooperated in arranging a time to repair the ceiling. Reply to Opposition to Foote's Motion for Summary Judgment, at 6 (citing Affidavit of Andre Logan, ¶¶ 14-16) (A435). Mr. Pajic denied that allegation, stating that he had contacted Mr. Chambers by phone numerous times. Tr. at 13 (A457). Mr. Pajic also pointed out that under the lease, Foote had a right of entry to make repairs with or without the tenant's prior consent. Opposition to Motion for Summary Judgment, at 17 (A366).

Summary Judgment, at 12-13 (A143-44). Foote speculates as to evidence that might have corroborated Mr. Pajic's account, such as damage to the unit above or below. *Id.* Much of Foote's suggested evidence would not, in fact, have been probative in this case[10] – and even if it were, the lack of such corroboration is a factor for the jury to weigh in deciding whether to credit Mr. Pajic. It is not a basis for judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .").

In its motion for summary judgment, Foote argued repeatedly that Mr. Pajic's testimony, in his sworn pleading and his deposition, was "unsupported" and therefore "not credible." Motion for Summary Judgment, at 12, 13, 15, 16, 17 (A143-44, A146-48). But Mr. Pajic's sworn statements, "supported" or not, are themselves sufficient to place material facts in dispute. *See Samm*, 890 A.2d at 141 (reversing summary judgment and finding that the appellant's deposition testimony served as evidence in support of her claim); *Raskauskas*, 589 A.2d at 26 (reversing grant of summary judgment where a sworn complaint "disputed all of the material facts relied on by appellees' summary judgment motion," despite the lack of supporting affidavits or any other corroborating evidence).

As this court has recognized, a party "'is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial.'" *Beckman v. Farmer*, 579 A.2d 618, 632 (D.C. 1990) (quoting 10A Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2725 &

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[10] Foote suggests, for example, that "if there was a 3 x 3 foot hole in Pajic's bathroom ceiling, then there would be a 3 x 3 foot hole in Unit 303's floor, directly above." Motion for Summary Judgment, at 13 (A144). As a factual matter, that is not necessarily the case; it is quite common to have structural material in between floors that would prevent a hole from reaching straight through from one level to the next. Nor did Foote offer any evidence in support of this speculation about the construction of the building.

n.36, 37). In this case, Mr. Pajic offered specific and detailed testimony, under oath, about his rent payments, his rent credits, and the condition of his unit. The trial court was not free to disregard those sworn statements in the record. Nor was it permitted to resolve Mr. Pajic's factual disputes with Foote – which ultimately turn on the witnesses' respective credibility – in favor of the landlord. Because the record in case placed several material facts in dispute, the trial court should have denied Foote's summary judgment motion and allowed the case to proceed to trial.

III. THE TRIAL COURT ERRED IN DISMISSING MR. PAJIC'S COUNTERCLAIM FOR BREACH OF CONTRACT.

In response to Foote's complaint, Mr. Pajic asserted a counterclaim for damages, alleging that Foote had breached the rental contract by failing to make repairs in a timely manner. The trial court dismissed the claim under Superior Court Rule 12(b)(6), ruling that Mr. Pajic's allegations did not plausibly to give rise to an entitlement to relief.[11] Order Granting Summary Judgment, Aug. 18, 2011, at 5-6 (A514-15) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). The court reasoned that Mr. Pajic had neither "allege[d] the breach of any cognizable duty owed to Defendant by Plaintiff nor set[] forth money damages suffered by Defendant as a result of any such breach." *Id.* at 6 (A515).

The trial court's ruling was incorrect. On its face, Mr. Pajic's Answer and Counterclaim sets forth a straightforward claim for breach of the implied warranty of habitability, included as a matter of law in every landlord-tenant contract in the District of Columbia. *See Javins v. First National Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir. 1970). He was not required to offer more, nor was he obligated to specify the money damages he was seeking at trial.

[11] Mr. Pajic also asserted claims for harassment and lost wages, which the trial court also dismissed for failure to state a claim under Rule 12(b)(6). Order Granting Summary Judgment, Aug. 18, 2011, at 6 (A515). Mr. Pajic does not seek review of those rulings.

A. **Mr. Pajic's counterclaim easily satisfied the "plausibility" standard of Rule 12(b)(6).**

"'To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Iqbal*, 129 S.Ct. at 1949, and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). This standard does not require a plaintiff to offer "detailed factual allegations"; instead, he simply must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949.

In evaluating a motion to dismiss under Rule 12(b)(6), the trial court must accept as true all of the complaint's factual allegations. *See Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) and *Twombly*, 550 U.S. at 555-56). And where, as here, the plaintiff is *pro se*, the complaint "must be held to less stringent standards than formal pleadings drafted by lawyers"; the question is whether, however "inartfully pleaded," the complaint sets forth facts that, if true, would warrant relief under the applicable law. *Erickson*, 551 U.S. at 94 (quotation marks and internal citations omitted). If so, then dismissal is not warranted and the plaintiff is entitled to proceed.

In this case, Mr. Pajic's counterclaim alleged that Foote had breached the warranty of habitability included in the parties' lease. As a matter of law, the warranty of habitability requires landlords to maintain their rental premises in substantial compliance with D.C. Housing Code. *See Javins,* 428 F.2d at 1082; 14 D.C.M.R. § 301 (Implied Warranty and Other Remedies) ("There shall be deemed to be included in the terms of any lease or rental agreement covering a habitation an implied warranty that the owner will maintain the premises in compliance with [the Housing Code]."). Where the landlord breaches that duty, the tenant may

withhold all or part of the rent for the unit. *See Javins*, 428 F.2d at 1082. And if the tenant pays rent in full during periods where the premises were not in compliance with the Housing Code, he may invoke the warranty of habitability to demand a refund. *See George Washington Univ. v. Weintraub*, 458 A.2d 43, 46 (D.C. 1983).

To establish a claim for a breach of the implied warranty of habitability, a tenant must prove that: 1) conditions existed in the unit or common areas that constituted more than a *de minimis* violation of the D.C. Housing Code, *see Winchester Mgmt. Corp. v. Staten*, 361 A.2d 187, 190 (D.C. 1976); 2) the landlord had actual or constructive notice of those conditions, *see Weintraub*, 458 A.2d at 49; and 3) the landlord failed to repair those conditions in a timely manner, *see id.* Mr. Pajic's Answer and Counterclaim pleads more than sufficient facts in support of each of these elements. First, the pleading contends that in June 2008, his air-conditioning failed during hot weather, and that although he "immediately" alerted Foote's agent to the problem, it took three weeks for the landlord to fix it. Answer and Counterclaim, ¶ 9 (A31-32). Mr. Pajic alleged that during this time, he was forced to forego weekend visits with his children because the apartment was "[un]inhabitable due to the high temperature." *Id.*

It is beyond dispute that nonfunctioning air-conditioning is a violation of the housing code. *See* 14 DCMR § 510.1. The complaint plainly alleges that the landlord had notice of the problem; and Mr. Pajic was entitled to the inference, at the 12(b)(6) stage, that three weeks was not a reasonable time in which to repair it, particularly where the temperature was at or near 90 degrees. And if, in fact, the apartment was uninhabitable such that Mr. Pajic had to cancel his custodial visits – facts the trial court was required to accept as true for purposes of the motion to dismiss – then the problem constituted more than a *de minimis* intrusion on Mr. Pajic's use and enjoyment of the unit.

Mr. Pajic's Answer and Counterclaim also alleged that shortly after the air-conditioning was repaired, "a massive water leak flooded the entire living room and bathroom." Answer and Counterclaim, ¶ 10 (A32). Mr. Pajic alleged that he placed Foote's agent on notice of the problem, which recurred several times; and that although the landlord tried to attend to the leak, it recurred a month after it had initially been repaired, at which point Foote's agent "stated that the previous repairs were not done properly." *Id.* ¶ 14 (A33). Mr. Pajic further alleged that although Foote eventually stopped the leaking, it "never fixed a large portion of the bathroom ceiling that was missing." *Id.* ¶ 10 (A32). He also alleged that as a result of the leak, the drywall in the living room suffered damage and began to emit a "strong unpleasant odor." *Id.* ¶13 (A32).

These allegations, like those regarding the air-conditioning, are more than sufficient to state a claim for breach of the warranty of habitability. Regarding the leak, Mr. Pajic's complaint alleges that Foote did not conclusively fix the problem until August 2008 at the earliest, more than a month after the problem appeared and after it again had damaged his belongings. *Id.* ¶ 14 (A33). Particularly at the pleading stage, these facts suggest that Foote did not respond to the leak in a reasonably timely manner. The complaint also alleges that a large hole in Mr. Pajic's bathroom ceiling received no attention from the landlord, much less a reasonably speedy repair.

Given these specific factual allegations, the trial court erred in concluding that Mr. Pajic had not "allege[d] the breach of any cognizable duty owed to [him] by Plaintiff." Order, August 18, 2011, at 6 (A515). Nor, assuming the case had survived the pleading stage, was Foote entitled to summary judgment on Mr. Pajic's breach of contract claim, as it argued to the trial

court. Motion for Summary Judgment, at 17 (A148).[12] As explained above, Mr. Pajic's sworn counterclaim and his deposition testimony are sufficient to place in dispute the facts regarding the conditions of the property and Foote's responsiveness in making repairs. *See supra*, at 25-27.

B. Mr. Pajic was not required to allege specific monetary damages.

Separate from its finding that Mr. Pajic had not sufficiently alleged a breach of contract, the trial court also ruled that the claim should be dismissed because he had failed to "set[] forth money damages" resulting from the breach. Order Granting Summary Judgment, August 18, 2011, at 6 (A515). As a matter of law, however, a warranty of habitability claim gives rise to damages in the form of a rent reduction. *See Hsu v. Thomas*, 387 A.2d 588, 589 (D.C. 1978); Restatement (Second) of Property: Landlord & Tenant, §§ 5.4, 11.1. Once a tenant has shown a breach of the warranty, he is entitled to an abatement of rent, the amount of which the jury must calculate according to the seriousness of the defects. In determining the abatement, the jury begins by taking the rent set forth in the lease agreement as "the value of an apartment in good repair." *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991). The jury must then deduct from that amount based on the severity of the code violations. *See Javins*, 428 F.2d at 1083.

A tenant is not required to prove – much less plead with any specificity – the "exact amount of damages" arising from a landlord's breach of the warranty of habitability. *Cowan v. Youssef*, 687 A.2d 594, 599 (D.C. 1996). For purposes of a motion under Rule 12(b)(6), it is sufficient to allege that the apartment is not in good repair, a charge that, if proven, would provide a basis for assessing damages in the form of an refund of some or all of the rent paid.

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[12] Foote never moved to dismiss Mr. Pajic's counterclaim under Rule 12(b)(6). Instead, it argued that "to the extent that [Mr. Pajic] even stated" a claim for breach of contract, Foote was entitled to summary judgment because there were no material facts in dispute regarding the alleged breach. Motion for Summary Judgment, at 17 (A148). The trial court ruled that Mr. Pajic had failed to state a claim for relief, and did not address the question of disputed material facts. Order Granting Summary Judgment, August 18, 2011, at 6 (A515).

Id.; *see Bernstein*, 649 A.2d at 1072; *cf. Doe v. Siddig*, 810 F. Supp. 2d 127, 137 (D.D.C. 2011) (denying motion to dismiss and holding that the plaintiff "is not required to plead with particularity damages that would typically be expected to flow from her claims").

Here, Mr. Pajic's Verified Answer and Counterclaim averred that he had paid the full rent of $1,450 for the month of June 2008; that he had paid $1,000 for the month of July 2008; that he had paid $1,450 in August 2008; $1,250 in September 2008; and the full rent of $1,450 for October through December 2008. He also alleged that during that time, he had experienced a period of non-working air-conditioning, which prevented him from visiting with his minor children; repeated floods from a leak in the bathroom; damaged drywall that created a strong odor; and a hole in his bathroom ceiling that was never fixed. These allegations, if proven, would entitle Mr. Pajic to a refund of at least some of the rent he paid to Foote. And in any event, they are more than sufficient – particularly in light of the generous construction required of this *pro se* pleading – to suggest a "plausible entitlement to relief" under the lease, which required Foote to maintain the unit in good repair as a condition of receiving the full monthly rent.

Finally, even if the court had evaluated Mr. Pajic's claim for damages under the summary judgment standard rather than under Rule 12(b)(6), he would have been entitled to make his case to the jury. "In the District of Columbia (as elsewhere), in order to survive a motion for summary judgment based on the asserted insufficiency of proof of damages, 'a plaintiff need not . . . show the amount of damages[;] he is obligated [only] to show that they exist and are not entirely speculative.'" *Cormier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 667-668 (D.C. 2008) (quoting *Rafferty v. NYNEX Corp.*, 744 F. Supp. 324, 331 n.26 (D.D.C. 1990)). As discussed above, the record in this case contained factual disputes as to the condition of Mr.

Pajic's unit and whether Foote addressed those conditions in a timely way. If the jury were to credit Mr. Pajic's version of events, then as a matter of law, those facts would establish a breach of the warranty of habitability and entitle him to an abatement of rent. The amount of that abatement would be an issue for the jury, and Mr. Pajic's failure to quantify it in his pleadings does not warrant a judgment in Foote's favor.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed, and the case remanded to the Superior Court for a trial on Foote's claim for rent and Mr. Pajic's counterclaim.

Respectfully submitted.

Julie H. Becker (No. 471080)
John C. Keeney, Jr. (No. 934307)
Legal Aid Society of D.C.
1331 H Street, NW, Suite 350
Washington, DC 20005
(202) 628-1161
jbecker@legalaiddc.org
jkeeney@legalaiddc.org

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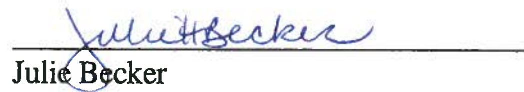
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellant to be delivered by first-class mail, postage prepaid, the 18th day of April 2012, to:

Laina Lopez
Berliner, Corcoran & Rowe, L.L.P.
1101 17th Street NW
Washington, D.C. 20036

Counsel for Appellee



Julie Becker