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 THE APPELLEE

Laina Lopez (No. 477412)
Berliner, Corcoran & Rowe, LLP
1101 Seventeenth Street, N.W., Suite 1100
Washington, DC 20036
Tel: (202) 293-5555
Fax: (202) 293-9035
Email: lcl@bcr-dc.com

Counsel for Appellee Foote Properties, L.L.C.

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, 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.

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

CORPORATE DISCLOSURE STATEMENT
FOR APPELLEE FOOTE PROPERTIES, L.L.C.

Pursuant to D.C. Court of Appeals Rules 27(d)(5) and 28(a)(2)(B), Appellee Foote Properties, L.L.C. makes the following disclosure:

1. Foote Properties, L.L.C. has no parent company.
2. Foote Properties, L.L.C. has no subsidiaries.
3. Foote Properties, L.L.C. is organized and exists under the laws of the District of Columbia and is a privately held company.
4. Foote Properties, L.L.C. is not publically held.

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2. Whether the trial court properly granted summary judgment in favor of Appellee Foote Properties, L.L.C. where Pajic failed to offer any competent evidence in support of his many inconsistent versions of the underlying events, thus failing to place material facts in dispute.
3. Whether the trial court properly dismissed Pajic's counterclaim for breach of contract where Pajic failed to plead any plausible factual content to suggest a breach of the implied warranty of habitability and where Pajic failed to plead damages.

COUNTER-STATEMENT OF FACTS

Foote disputes Pajic's Statement of Facts, which fails to reflect the many inconsistencies between Pajic's Answer and Counterclaim, his deposition, and his filings below and before this Court. To ascribe these inconsistencies to an unclear record (Appellant Br. at 7 n.1) is an understatement. Pajic indisputably filed a verified Answer and Counterclaim, hence swearing to the veracity of his averments. He then was deposed under oath and contradicted his own sworn averments with different versions of his story. His story continued to shift with each court filing thereafter. Pajic cannot have it both ways – he cannot ask this Court on the one hand to consider his sworn Answer and Counterclaim and deposition as competent evidence suggesting material disputed facts and on the other hand also ask this Court to disregard the many material inconsistencies within his own sworn testimony and averments, none of which were ultimately supported by any other evidence.

The simple, proven facts are these: Foote and Pajic executed a valid lease agreement on May 8, 2008 ("the Lease"). Under the Lease, Foote agreed to rent, from June 1, 2008, to May 31, 2009, one of the condominiums in Foote's building, located at 4725 Foote St., Northeast, Washington, D.C. ("the Building"). *See id.* ¶1 (A17). Pajic agreed to pay monthly rent of $1,450.00, as well as an additional $100.00 late fee in the event of untimely payment. *See id.* ¶¶ 2, 21 (A17, A20). The Lease also provided that, if Foote needed to employ an attorney to enforce any of the Lease's conditions or covenants, including the collection of rental payments, Pajic agreed to pay all expenses incurred, including reasonable attorney's fees. *See id.* ¶23 (A20). Pajic admitted the validity of the Lease, and did not dispute any of the applicable terms. *See* Foote 2/1/11 Statement of Material Facts as To Which There Is No Genuine Issue ("Foote Statement") ¶¶3-6, 23 (A153, A156). *See also* Summ. J. Order at 2, 4 (A511, A513).

Pajic moved in to Unit 203 of the Building and paid rent for certain months. Foote Statement ¶¶8-11 (A153-154). He did not, however, pay any rent at all from October 2008 to February 2009, and paid only partial rent in July 2008. *See id.* ¶¶12-18 (A154-155). Foote accordingly assessed Pajic a late fee of $100.00 for each of the months in which he did not pay rent. *See* Foote Statement ¶19 (A155). Pajic does not dispute that Foote assessed these late fees and that he did not pay any of them. *See id.* ¶20 (A156). *See also* Summ. J. Order at 2 (A511). Pajic also indisputably moved out of Unit 203 on or around March 7, 2009. *See* Foote Statement ¶21 (A156); Appellant Br. at 4. In sum, Pajic failed to pay rent and late fees in an amount totaling $8,200.00. *See* Foote Mem. In Support of Mot. for Summ. J. at 16 (A147). *See also* Foote Statement ¶22 (A156); Summ. J. Order at 2, 4 (A511, 513).[1]

[1]To the extent Pajic raises an issue about a $500 damage deposit not being deducted from the judgment amount (Appellant Br. at 24), that issue can be addressed, if this Court sees fit, through

At his deposition, Pajic *admitted* that he failed to pay full rent in January and February 2009 and July 2008 as well as the attendant late fees in these months. *See* Foote Statement ¶¶12, 17-18 (A154, A155). Pajic also *admitted* that he owed Foote "at most" $6,150. *See* Pajic 3/4/11 Opp'n to Foote Mot. for Summ. J. at 11 (A360).

In discovery and filings before the trial court and this Court, however, Pajic has asserted various inconsistent claims as to *why* he did not pay for those months and *why* Foote did not have a record of payment for the other months. For instance, Pajic has claimed that Foote had given him a rent credit for July 2008, due to a leak in his Unit, *see* Pajic Countercl. ¶¶10, 14 (A32-33); *see also* Appellant Br. at 3. Pajic, however, adduced zero competent evidence in support of any "damage to his belongings" and zero competent evidence in support of Foote authorizing a rent reduction for such a leak. (*Contra* Appellant Br. at 3); (*see* Summ J. Order at 4, A513).

Pajic also claimed below and before this Court that he made cash payments to Foote for October, November, and December 2008, *see* Pajic Countercl. ¶¶17-18 (A33-34); Appellant Br. at 4. Again, however, Pajic's own claims are inconsistent and Pajic adduced zero competent evidence in support of any one of his versions of the facts. For example, in his deposition and Appellant Brief (pages 3, 5-6), he contends not (as in his sworn Counterclaim) that he paid cash for October 2008, but that he relied on the last installment payment to cover that month's rent. Moreover, during deposition, Pajic testified that he had evidence, in the form of contemporaneous notes (*see* Ex. 4 to Foote Mot. for Summ. J., 61:15-62:12, A252-253), of the cash payments but failed to produce them in discovery. Pajic also did not dispute that Foote has a strict policy against accepting cash payments for rent. *See* First Decl. of Foote Co-Manager Nelson Abramson, filed as Ex. 7 to Foote Mot. for Summ. J., ¶15 (A323).

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a limited remand with specific instructions. That issue in no way merits a full-blown reversal of the trial court's careful Order and Judgment.

Pajic also inconsistently claimed that Foote had agreed to credit the last installment payment (*see* Lease ¶2, A17) to cover the rent for January and February 2009 (*see* Pajic Countercl. ¶21, A34), but at deposition and again in his Brief before this Court, claimed that Foote had agreed to apply this last installment payment to cover the October 2008 rent. *See* Ex. 4 to Foote Mot. for Summ. J., 65:1-16 (A254); Appellant Br. at 3.

In sum, Pajic's testimony on material facts is shot through with inconsistencies, and Pajic failed to bring forth *any* competent evidence in support of any of his many inconsistent excuses for failing to pay rent and late fees. Finally, Pajic admitted that he owed $6,150.00.

Foote also indisputably employed undersigned counsel to collect the rent and late fees owed by Pajic (*see* Foote Statement ¶24 (A156); *see also* Summ. J. Order at 4-5 (A513-514) and incurred and paid $44,519.67 in attorney's fees in prosecuting this lawsuit. Although Pajic filed an opposition on July 11, 2011 disputing the reasonableness of the amount of attorney's fees, he did not dispute, in the trial court, that Foote was entitled to fees under Lease ¶ 23, and nowhere disputes that Foote has incurred and paid $44,519.67 in fees.

ARGUMENT

I. This Court Should Not Hear an Issue Regarding the Trial Court's Attorney's Fees Award That Was Not Raised Below and In Any Event Was Not Plain Error

Pajic argues on appeal an issue that was not raised below – that the attorney's fees award is based on a "lease provision that is invalid under the plain terms of the District of Columbia housing code." (Appellant Br. at 12). Foote disagrees.

Pajic may not raise this argument now. (*Contra id.* at 19-20). "It is fundamental that arguments not raised in the trial court are not usually considered on appeal." *Thornton v. Norwest Bank of Minn.,* 860 A.2d 838, 842 (D.C. 2004). *See also Padou v. D.C.,* 998 A.2d 286, 292 (D.C. 2010) ("the general principle" is that *pro se* litigants "can expect no special treatment

from the court."). As Pajic concedes, the only exception to the fundamental principle that claims not properly preserved will not be reviewed on appeal is "when necessary to prevent a clear miscarriage of justice" based on "plain" error. (Appellant Br. at 19-20). Pajic comes nowhere close to meeting that stringent standard, regardless of whether the issue is a legal one. (*Contra id.*).

First, Pajic was far from an "unsophisticated defendant" "unaware" of D.C. law when he represented himself *pro se.* (*Contra* Appellant Br. at 20). He filed a verified Answer and Counterclaim, issued and responded to discovery requests, filed multiple motions, participated actively in oral argument, and timely noted an appeal. (*See, e.g.,* Summ. J. Order at 1, A510). Pajic was resourceful and often cited to D.C. law, including the D.C. Housing Code. *See, e.g.,* Pajic Opp'n to Summ. J. Mot. at 4-5, 17-18, 34-35 (A353-354, A366-367, A383-384), citing D.C. law and D.C. Housing Code).[2] He cannot now claim ignorance of the very laws upon which he relied below.

Second, it is irrelevant what sort of "financial consequences" (Appellant Br. at 20) a valid judgment would have on a defendant, but it is noteworthy that the size of the judgment in this case is due to Pajic's own litigation tactics. Indeed, the award for unpaid rent and late fees is only $8,200. The attorney's fees award of $44,519.67 would have been significantly smaller had Pajic complied with discovery requests and not filed so many redundant, confusing motions to which Foote's attorneys then had to respond. As the trial court held, "Throughout these proceedings,

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[2] Pajic also filed, following the trial court's oral ruling on the summary judgment motion, a document containing multiple citations to D.C. law, including D.C. housing regulations, challenging the court's ruling "based on what [Pajic] terms newly-discovered evidence." Summ. J. Order at 6 (A515). As the trial court wrote, Pajic "alleges that Plaintiff did not have a valid Certificate of Occupancy or Basic Business Housing Residential License during the time period in question." (*Id.*). Pajic's challenges were not successful (*id.* at 6-7, A515-516), but they further demonstrate Pajic's knowledge of and reliance on D.C. regulations and law at the trial level, when Pajic was *pro se*.

Plaintiff was required to contend with three counterclaims that had no basis in the evidence, as well as the repeated delays and potentially dilatory tactics of Defendant, as evidenced in the production of documents and the filing of pleadings." (Attorney's Fee's Order at 3, A520, internal citations omitted). In short, there is no "manifest injustice" justifying this Court's review of an issue not raised below.

In addition, the trial court made no plain error or "clear violation of D.C. law." (Appellant Br. at 20). Pajic's argument rests on an assertion that D.C. Municipal Regulations §§304.4 and 304.1 renders the attorney's fees provision in the Foote-Pajic Lease void and unenforceable. Pajic is wrong. Section 304.1 provides: "Any provision of any lease or agreement contrary to, or providing for a waiver of, the term of this chapter, or §101 or §106 of chapter 1, shall be void and unenforceable." D.C.M.R. §304.1. And, §304.4 provides:

> No owner shall place (or cause to be placed) in a lease or rental agreement a provision waiving the right of a tenant of residential premises to a jury trial, or requiring that the tenant pay the owner's court costs or legal fees, or authorizing a person other than the tenant to confess judgment against a tenant. This subsection shall not preclude a court from assessing court or legal fees against a tenant in appropriate circumstances.

D.C.M.R. §304.4.

Section 304.4 does not, as a matter of law, render invalid a lease provision that permits the recovery of attorney's fees for debt collection actions after termination of the tenancy. *See* Kenneth J. Loewinger & R.J. Turner, D.C. Landlord-Tenant Law §1.2p (1986) (noting that a "Suit for nonpayment" clause in a lease refers in part to "attorney's fees for debt actions, subsequent to the termination of the tenancy. Attorney's fees for the landlord and tenant action are prohibited by the Housing Regulations."). The action below was precisely one for collection of rent after Pajic's tenancy had terminated.

Pajic contends that §304.4 applies "regardless of the procedural context" (Appellant Br. at 15), arguing that the "plain" language supports his construction. Not so. The rule applies, by its terms, only to "tenants" and "owners."

In any event, Pajic cites no authority to support his proposed construction of the rule. By contrast, Foote cites (*see supra*) "D.C. Landlord-Tenant Law," which in turn was cited by this Court as a reliable authority in *Canada v. Mgm't P'ship, Inc.,* 618 A.2d 715, 720 n.15 (D.C. 1993).[3] At a minimum, Foote's citation of this authority as direct support of its position demonstrates that the rule is subject to interpretations other than Pajic's unsupported interpretation and hence, to the extent there was error (there was not), it certainly was not "plain."

Also, permitting attorney's fees for debt actions, subsequent to the termination of a tenancy, in fact complements the public policies associated with landlord-tenant law. (*Contra* Appellant Br. at 15). It encourages tenants to pay their rent while they remain tenants and thus avoid incurring attorney's fees in a post-tenancy debt action. It also enhances judicial efficiency because it encourages a tenant to raise disputes with a landlord during the tenancy in landlord-tenant court. Further, to the extent a tenant validly withholds rent and moves out due to housing regulation violations by the landlord, a landlord would not win a debt action and hence would not be entitled to fees anyway. In other words, this former tenant – Pajic – had the option to pay his rent and move out or to take his dispute with the landlord to landlord-tenant court during the course of his tenancy. He elected to do neither of those things and hence triggered the nonpayment clause.

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[3] Pajic dismisses the Loewinger/Turner hornbook as "hardly. . . neutral" because one of its two authors, Loewinger, was "a leading advocate for landlords." (Appellant Br. at 15 n.5). Pajic, however, cites no proof of Loewinger's bias, does not assert any bias on the part of the co-author, R.J. Turner, and as discussed above, provides no authority of his own.

Even if, contrary to Foote's argument, §304.4 did apply in this post-tenancy context, the Lease provision at issue is conditional and not absolute. That is, parsing the language of the Foote-Pajic Lease, it is clear that the provision did not "require" Pajic to pay attorney's fees.

Paragraph 23 of the Foote-Pajic Lease (A20) states in full:

> 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.

This 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." *See Canada,* 618 A.2d at 719-20 (accepting landlord's argument that lease provision with conditional language did not "require" the award of attorney's fees and thus did not violate the regulation).

Pajic challenges Foote's reliance on *Canada*, accusing Foote of a "misguided" "reading" of that case. (Appellant Br. at 16). But, we agree with Pajic to the extent "the landlord's own argument in *Canada* doomed the fee claim." (*Id.*). In that case, the landlord's argument was summarized as follows:

> as we understand it, the landlord's interpretation of the clause is that the parties agree that the trial court may determine whether, and if so how much, attorney's fees should be recovered by the landlord, and the tenant agrees to pay whatever fees the trial court may so determine. The lease clause thus acts as an independent source of power in the trial court to award attorney's fees, but gives the landlord no absolute right to such fees. In this sense, the lease clause is the equivalent of a statutory provision authorizing, but not requiring, the award of attorney's fees to a prevailing party, as contrasted to a statute that gives the prevailing party attorney's fees as of right.

Canada, 618 A.2d at 719 n.12. If this Court in *Canada* thought the landlord's argument had no merit, it would have said so, and the fee claim might not have been "doomed." But, as Pajic

agrees, the Court *accepted* the landlord's argument, thus dooming its fee claim. It is that same argument that Foote advances here, and it is that same argument that should be accepted here.

Pajic argues, however, that Foote's definition of conditional would encompass all fee-shifting terms and "would nullify the regulation entirely." (Appellant Br. At 16-17). Not so. The regulation applies to "court costs or legal fees" and is not limited to "attorney's fees." Foote's definition of conditional makes sense because a person can incur "court costs" or "legal fees" that are not linked to the hiring of an attorney.[4]

Finally, we note that §304.4 provides, "This subsection shall not preclude a court from assessing court or legal fees against a tenant in appropriate circumstances." Hence, §304.4 does not doom the trial court's fee award in this case. (*See* Attorney's Fees Order at 1-3, A518-520, discussing attorney's fees being warranted in this case "in the interest of justice.") (internal citations and quotations omitted). Pajic argues that this phrase permits a court to award fees only pursuant to its "inherent powers" (*id.*) yet cites no authority for that proposition. Indeed, *McClintic v. McClintic,* 39 A.3d 1274 (D.C. 2012) (cited in Appellant Br. at 14), does not construe §304.4. *See also Canada,* 618 A.2d at 719 n.12.

In sum, Pajic cannot now argue that the fee award is unenforceable and has not shown, under D.C.M.R. §§304.4 and 304.1, a clear miscarriage of justice or plain error.

II. Pajic Has Not Shown Any Genuine Issues of Material Fact That Warrant Reversal

[4] Foote is confident that §304.4 does not apply in the post-tenancy context, and to the extent it does apply here, that the Foote Lease contains only a conditional, not an absolute, fee-shifting clause which excepts it from §304.4's application. For those reasons, Foote does not, in this brief, rely on the "reasonable" language of the Lease provision at issue. Hence, none of Pajic's arguments regarding the "reasonableness" of the fee (Appellant Br. at 17-18) are relevant to this appeal.

Pajic argues that the trial court "erroneously granted summary judgment" based on supposed "genuine factual disputes" raised solely by Pajic's "sworn Answer and Counterclaim." (Appellant Br. at 21). Pajic is again wrong.

Although a sworn answer and counterclaim is tantamount to an affidavit (Appellant Br. at 21), it does not provide a litigant a free pass to avoid summary judgment. Rule 56(c), SCR-Civ., provides that summary judgment is proper "if 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 a judgment as a matter of law." (Emphasis added). To defeat a well-supported summary judgment motion, the nonmoving party must produce "*competent* evidence admissible at trial showing that there is a genuine issue as to a material fact." *Hill v. White*, 589 A.2d 918, 921 (D.C. 1991) (emphasis added) (internal citations and quotations omitted). (*See also* Foote Mot. Summ. Aff. at 3, 7, discussing court's order considering whether Pajic put forth "competent" evidence in support of his defenses and counterclaim). Put differently, "the burden on the nonmoving party – here, Pajic – is "'that *sufficient* evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve *the parties'* differing versions of the truth at trial'" *Hill,* 589 A.2d at 921 (emphasis added), not to resolve *one party's* differing versions of the truth. Where a rational trier of fact, considering the record as a whole, could not find for the nonmoving party, there is no genuine issue for trial and summary judgment should be affirmed. *See id.*; *see also Dickson v. D.C.*, 938 A.2d 688, 690 (D.C. 2007) (relying on *Hill* and affirming summary judgment where evidence was so one-sided that moving party had to prevail). Here, the presence of many inconsistencies *within* one party's versions of the truth – as opposed to *between* the parties'

versions of truth – and the fact that the motion for summary judgment was made *after* lengthy discovery underline the correctness of the trial court's ruling.

In short, whatever effect might be given to a sworn answer and counterclaim standing alone, in the face of an extensive record following discovery, they have no status superior to the record as a whole. In this case, every other piece of evidence discovered and submitted to the Court supports Foote's claim. Indeed, Pajic's own deposition testimony *directly contradicts* his own denials and allegations. Thus, this is not a case where the trial judge determined that Foote's witnesses were more credible than Pajic. (*Contra* Appellant Br. at 22). Rather, this is a case where, as the trial court stated in its Order, Pajic had failed to provide "*sufficient* evidence in support of the party's assertions to require a jury or judge to resolve the differing versions of truth. There must be some significant probative evidence tending to support the complaint so that a reasonable fact-finder could return a verdict for the non-moving party." Summ. J. Order at 3 (A512). Pajic's multiple, confusing, and inconsistent versions of the facts do not "sufficient evidence" make. (*Id.* at 4, A513).

A. Cash Payments

Pajic alleges (Counterclaim ¶¶17-18, A33-34) that he paid Foote – in cash – $1,450 in October 2008 and $2,900 in November 2008. (Appellant Br. at 23). As to October, however, Pajic testified during deposition that he did *not* pay October's rent in cash (as alleged) but rather that Foote had agreed to apply, to October's rent, a "last installment" payment made out to Foote in May 2008 pursuant to Lease ¶ 2. (*See* Foote's Statement of Material Facts as to Which There is No Genuine Issue ("Statement") ¶¶9-10, 14 (A154, A155). Further, at deposition, Pajic

testified that he had and would produce contemporaneous notes of any cash payments made to Foote.[5] He *never* produced them and later conceded he did not have them.[6]

Moreover, Pajic did not dispute the declarations of Foote's co-managers, Nelson Abramson and Frank Chambers, that Foote has a strict policy of not accepting cash payments toward rent, that no exception was ever made for Pajic, and that there is no contemporaneous notation in Foote's books that Pajic paid any rent in any form during these three months.[7] (*See also* Foote Mot. for Summ. Aff. at 3, 7).

Pajic's allegations are not supported by competent evidence sufficient to raise a genuine issue of material fact. (*Contra* Appellant Br. at 23-24).

B. The "Advance Rent Payment"

Pajic alleged that he paid one month's rent in advance in May 2008, and that the advance payment would be applied to cover the rent for January 2009. (Counterclaim ¶21, A34). (Appellant Br. at 24). Foote does not disagree that, pursuant to Lease ¶ 2, Pajic made a last installment payment in May 2008. (Statement ¶¶9-10, A154). Pajic's own deposition testimony that Foote agreed to apply the last installment payment to cover *October 2008*'s rent[8] directly conflicts, however, with his Verified Answer and Counterclaim asserting that Foote agreed to apply that last installment payment to cover January 2009's rent. Further, Pajic did not dispute the declarations of Foote's managers who declared that Foote generally does not credit such last installment payments toward a tenant's rent during the tenant's occupancy, and did not make any

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[5] *See* Excerpts of Pajic Dep., filed as Ex. 4 to Foote Mot. for Summ. J., 61:15-62:12 (A252-253).
[6] *See* Pajic Opp'n to Foote Mot. to Compel at 2 (A117).
[7] *See* Decl. of Frank Chambers, filed as Ex. 6 to Foote Mot. for Summ. J., ¶21 (A318-319); Decl. of Nelson Abramson, filed as Ex. 7 to Foote Mot. for Summ. J., ¶15 (A323).
[8] Ex. 4 to Foote Mot. for Summ. J., 65:1-16 (A254). As described above, October 2008 is also one of the months in which Pajic allegedly paid Foote in cash.

exception for Pajic.[9] (*See also* Foote Mot. for Summ. Aff. at 3, 7). Pajic's allegations are not supported by competent evidence sufficient to raise a genuine issue of material fact.

C. Rent Credits and "Reduction in rent"

Pajic alleged that he was given rent credits in the amounts of $450 and $200 for supposed "water damage" occurring in July 2008 and August 2008 respectively. (Counterclaim ¶¶10, 14 (A32-33). (Appellant Br. at 24-28).

First, Foote did not seek recovery of rent for the months of August or September 2008. (*See* Foote Mem. in Support of Summ. J. at 2 n.2, A133). (*Contra* Pajic Countercl. ¶14 (A32-33), which alleges a $200 reduction in rent for "the next rental payment" after the August 2008 damage). (*Contra* Appellant Br. at 25). No inferences may be drawn (*contra id.*) from claims not made or withdrawn.

As for the supposed $450 rent reduction given for July 2008's rent (Appellant Br. at 26-27), Pajic provided no evidence in support of this allegation (Foote Statement ¶26 (A157); *see also* Foote Mot. for Summ. Aff. at 3, 7) and did not dispute that Foote, not Pajic, paid to repair the small leak which did occur.[10] Further, Pajic did not challenge the declarations of Foote's co-

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[9] *See* Ex. 6 to Foote Mot. for Summ. J. ¶22 (A319); Ex. 7 to Foote Mot. for Summ. J. ¶¶16-17 (A323).

[10] *See* Ex. 6 to Foote Mot. for Summ. J. ¶¶10, 20 (A316, A318); Ex. 7 to Foote Mot. for Summ. J. ¶17 (A323-324). Below, Foote agreed that a small leak occurred in Pajic's unit, and Pajic did not dispute that it was fixed within days. (*See* Ex. 4 to Foote Mot. for Summ. J., 98:12-19, A272). Pajic characterized the result of the leak as a "flood" but *never* substantiated this characterization in discovery. Both Chambers and Andre Logan, Foote's repairman, declared – in unchallenged declarations – that the leak in Pajic's unit was small and caused no flood. *See* Ex. 6 to Foote Mot. for Summ. J. ¶¶12-13, 19 (A317, A318); Aff. of Andre Logan, filed as Ex. 8 to Foote Mot. for Summ. J., ¶¶6-7, 9 (A343). Further, Pajic testified that he had photographic evidence of supposed extensive water damage. *See* Ex. 4 to Foote Mot. for Summ. J., 103:5-18; 113:5-10, 121:2-7 (A275, A281, A283). Later, however, he admitted he had no such evidence. *See* Pajic Opp'n to Foote's Mot. to Compel, 2 (A117). He also did not dispute that, even with the supposed "flood[s]," he continued to live in his unit at all times. *See* Statement ¶¶3, 21 (A153, A156). (*Contra* Appellant Br. at 23-28).

managers, which declared that they at no time authorized a rent credit for any reason to Pajic, nor would they have agreed to such a credit in these circumstances.[11] Pajic's allegations are again not supported by competent evidence sufficient to raise a genuine issue of material fact.

In short, given the numerous inconsistencies between Pajic's sworn Answer and Counterclaim and his own deposition testimony, combined with the facts that (a) Pajic *admitted* that he owed approximately $6,150 (Foote Mot. for Summ. Aff. at 3), and, (b) Foote submitted substantial consistent and un-contradicted evidence supporting its claim, the trial court properly found no genuine issues of material fact that warranted a costly trial by jury.

III. The Trial Court Did Not Err In Dismissing Pajic's Counterclaim

Pajic argues (Appellant Br. at 28-29) that the trial court erred by dismissing his breach of contract claim because it alleged that Foote had "breached the warranty of habitability" (*id.* at 29). Foote disagrees.

On a Rule 12(b)(6) motion, the question is "whether the complaint includes well-pleaded factual allegations as an initial matter, and whether such allegations plausibly give rise to an entitlement for relief." *Mazza v. Housecraft, LLC,* 18 A.3d 786, 790 (D.C. 2011). Pajic wholly failed to meet this test.

A breach of the implied warranty of habitability requires: (1) a condition constituting a more than *de minimis* violation of the D.C. Housing Code, (2) landlord notice of such condition, and (3) the landlord's failure to repair the condition within a reasonable time. *See Wright v. Hodges*, 681 A.2d 1102, 1105-6 (D.C. 1996) (adding that one or two minor violations which do not affect habitability are *de minimis* and would not entitle a tenant to a rent reduction). Pajic argues that he pled two conditions which violate this implied warranty: (1) the air conditioning

[11] *See* Ex. 6 to Foote Mot. for Summ. J. ¶22 (A319); Ex. 7 to Foote Mot. for Summ. J. ¶16 (A323).

unit in his apartment did not work properly and was repaired within three weeks, (2) and a "massive water leak [which] flooded the entire living room and bathroom," which was fixed but apparently not to Pajic's satisfaction. (Appellant Br. at 30-31).

First, Pajic fails to show that he pled *any* factual content to suggest, plausibly, that either an air conditioning unit not working for a short period of time or a leak fixed but not to the tenant's satisfaction qualify as violations of the D.C. Housing Code. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2008) (claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged."). Speculation is insufficient. *Id.*

Second, Pajic fails to show that he pleaded any factual content to suggest that Foote did not make the repairs alleged in a "reasonable time." Indeed, later, in discovery, Pajic conceded that Foote timely made the repairs. (*See* Ex. 4 to Foote Mot. for Summ. J., 98:2-99:18 (A272-273). He points to nothing in the Housing Code suggesting a specific time frame within which to repair an air conditioning unit, nor suggesting that a particular repair needs to meet the tenant's satisfaction. (*Contra* Appellant Br. at 30-31).

Third, as the trial court found, Pajic failed to plead damages, too. Pajic now argues that Counterclaim ¶¶ 10 and 14 adequately plead damages (in the form of rent abatement) by alleging that "the apartment is not in good repair" due to the water leak (Appellant Br. at 32). Not so. As discussed above, Pajic used those very same allegations to argue entitlement to rent credits in his *defense* to Foote's breach of contract claim. Because the trial court rejected his assertion of entitlement to rent credits based on water damage under Rule 56, he cannot now argue that those same allegations pass the muster of Rule 12(b)(6). *See Termorio S.A. v. Electranta S.P.*, 487 F.3d 928, 940-41 (D.C. Cir. 2007) ("Where, as here, both parties had sufficient opportunity to present

evidence beyond the pleadings, this court has the authority to convert a motion to dismiss under Rule 12(b)(6) to a grant of summary judgment under Federal Rule of Civil Procedure 56 and affirm the judgment of the District Court."). *See also Launay v. Launay, Inc.,* 497 A.2d 443, 447 (D.C. 1985) (same); *Wemhoff v. Inv. Mgm't Corp.,* 455 A.2d 897, 898-99 (D.C. 1983) (same).

CONCLUSION

For all the foregoing reasons, Foote respectfully requests that this Court affirm the trial Court's Orders and Judgment in all respects.

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Washington, D.C.

Respectfully submitted,

By: _____

Laina Lopez
D.C. Bar No. 477412

Berliner, Corcoran & Rowe, L.L.P.
Suite 1100
1101 17th Street, N.W.
Washington, D.C. 20036
Tel: (202) 293-5555
Fax: (202) 293-9035
Email: lcl@bcr-dc.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Appellee was served on Appellant the 31st day of May 2012, via first-class mail, postage prepaid, on:

Julie H. Becker
Legal Aid Society of D.C
1331 H Street, Northwest, Suite 350
Washington, D.C. 20005

Laina Lopez