No. 11-CV-210

DISTRICT OF COLUMBIA COURT OF APPEALS

KIM KELLY,

Appellant,

v.

CRAWFORD EDGEWOOD MANAGERS,

Appellee.

On Appeal from the Superior Court of the District of Columbia, Civil Division, Landlord And Tenant Branch

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BRIEF OF APPELLANT

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* Presenting oral argument

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

The parties to this case are appellant Kim Kelly, the defendant below, and appellee Crawford Edgewood Managers, the plaintiff below.

In the trial court, Ms. Kelly proceeded pro se through the entry of judgment, and then was represented by Beth Mellen Harrison of the Legal Aid Society of the District of Columbia on her post-judgment motion. She is represented in this Court by Ms. Harrison, John C. Keeney, Jr., and Julie H. Becker of the Legal Aid Society.

In the trial court, Crawford Edgewood Managers was represented by Sheldon Schuman and Emilie Fairbanks of Schuman and Felts, Chtd. The landlord is represented in this Court by Jonathan Schuman of Schuman and Felts.

No intervenors or amici appeared in the trial court.

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STATEMENT OF THE CASE & THE ISSUES PRESENTED

This case involves an appeal from a judgment for possession in the Landlord and Tenant Branch of Superior Court. The landlord and tenant settled a dispute over the tenant's alleged violation of a lease provision prohibiting pets and the tenant's defense that she should be allowed to keep the pet as a reasonable accommodation for her son's disability. A dispute arose about whether the tenant had satisfied her obligations under the settlement agreement, and the landlord invoked the court's authority to enforce those obligations. The trial court then entered a nonredeemable judgment for possession against the tenant. The questions presented are:

1. Whether the trial court erred as a matter of law by entering a nonredeemable judgment against the tenant for an alleged breach of the parties' settlement agreement, where that agreement did not authorize the entry of a judgment for possession or admit the tenant's liability;

2. Whether (assuming the court had the authority to enter a nonredeemable judgment for possession) the trial court abused its discretion by entering such a judgment against the tenant and forfeiting her tenancy for breaching the settlement agreement, without giving the tenant an opportunity to cure the alleged lease violation by removing the pet, a lesser remedy that would have resolved the violation and avoided substantial hardship to the tenant, who would lose her housing subsidy if she loses her home.

STATEMENT OF FACTS

Kim Kelly has resided at Gibson Plaza Apartments, 1301 7th Street, N.W., #921 since approximately July 1999. She lives in the apartment with her son, Sean Kelly, who is 18 years old. (A.A. 130.) The apartment receives a subsidy under the federal project-based section 8 program. (A.A. 102, 111-12, 161.) Ms. Kelly pays rent based on her income, and the United States Department of Housing and Urban Development (HUD) pays the remainder of the rent directly to

the landlord pursuant to a contract covering the entire housing project. Because the subsidy is tied to the project, if Ms. Kelly is evicted, she will lose this housing subsidy. *Id.*[1]

The complaint in this case is based on a Notice to Correct or Vacate dated May 24, 2010 for keeping a dog in violation of the lease. (A.A. 21-24.) Ms. Kelly had received the dog in April 2010 as a gift. (A.A. 130.) Her son, Sean, quickly formed a strong emotional attachment to the animal. (A.A. 127-28, 130-31.) Ms. Kelly then began to observe strong improvements in the symptoms that her son exhibits as a result of post traumatic stress disorder, a mental health condition that he has had since he was seven years old. *Id.* Ms. Kelly therefore believed that the dog had become a critical emotional support animal for her son. *Id.*

On June 17, 2010, before the expiration of the cure period under the 30-day notice, Ms. Kelly sent a letter to the landlord's attorney asserting that, notwithstanding the lease, she had a right to keep the dog as a reasonable accommodation for her son Sean's disabilities. (A.A. 120-22, 131.) The letter included supporting documentation about her son's disabilities. Although the letter triggered an obligation on the part of the landlord to engage in a dialogue with Ms. Kelly about whether the accommodation she requested was reasonable, the landlord did not respond. As a result, Ms. Kelly could not cure the alleged lease violation without relinquishing her good faith defense under local and federal law that her family's possession of the dog was legally protected.

In July 2010, the landlord filed a complaint for possession against Ms. Kelly in the Landlord and Tenant Branch of Superior Court. (A.A. 15-19.)

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[1] Under the project-based section 8 program, the federal government provides tax breaks and other incentives for owners to develop projects which include subsidized apartments. *See generally* 42 U.S.C. § 1437f(b), (g); 24 C.F.R., parts 880-81, 883-84, 886, 891. The program is distinct from the federal Housing Choice Voucher Program, where a tenant receives a voucher that she can use to rent an apartment on the private market. *See generally* 42 U.S.C. §1437f(o); 24 C.F.R., part 982. In the former program, the subsidy is linked to an entire housing project, whereas in the latter program, the subsidy is linked to an individual tenant.

Prior to the initial hearing date, Ms. Kelly consulted with HUD and filed an administrative complaint for disability discrimination, based on the landlord's refusal to grant her reasonable accommodation request. (A.A. 131.) Ms. Kelly's complaint was referred to the District of Columbia Office of Human Rights for adjudication. *Id.* Before the trial date in Superior Court, the parties attended mediation at the Office of Human Rights and entered into a settlement agreement. (A.A. 26-31, 131-32.) Ms. Kelly agreed to submit a request to the landlord to keep her dog as an emotional support animal, including "appropriate medical documentation," within ten days. (A.A. 26.) Ms. Kelly also agreed that the dog would wear a muzzle at all times when outside of her apartment. *Id.* The landlord agreed that within six to twelve months it would adopt a new pet policy that would grandfather in and exempt all existing pet owners, including Ms. Kelly, and Ms. Kelly agreed that she would sign this new policy. *Id.*

When the parties appeared in the Landlord and Tenant Branch on September 30, 2010 for trial, they filed a copy of the settlement agreement attached to a praecipe. (A.A. 25-31.) The praecipe requested that the court dismiss the case, based on the resolution reached through the Office of Human Rights. (A.A. 25.) The praecipe also stated that if "Defendant fails to abide by this agreement, Plaintiff may enforce the agreement in this case." *Id.* Neither the agreement itself, nor the praecipe, stated that Ms. Kelly had agreed to the entry of judgment if she violated the settlement agreement. (A.A. 25-31.) To the contrary, both parties expressly disclaimed any admission of liability in the agreement. (A.A. 27.)

The landlord was represented by counsel in the landlord-tenant case. (A.A. 1-14, 25, 32-35.) Ms. Kelly was not represented by counsel in either the mediation at which the settlement was reached or the September 30 hearing at which the settlement was approved and the court dismissed her landlord's complaint. *Id.* On September 30, the presiding judge (R. Johnson, J.) signed the

settlement agreement and entered it on the record in open court. (A.A. 32-35.) The judge did not adopt the settlement agreement as an order of the court. (A.A. 13, 32-35.) As requested by the praecipe, the court dismissed the landlord-tenant case. *Id*. At no point in the proceedings did anyone suggest that Ms. Kelly could be evicted if she breached the agreement. (A.A. 32-35.)

To comply with the settlement agreement, Ms. Kelly obtained a new letter from her son's medical doctor. (A.A. 119, 132.) This letter was provided to the landlord on October 7, 2010, within the ten-day period set forth under the settlement agreement. *Id*.

Upon receiving a response from the landlord that this first letter was not sufficient, Ms. Kelly obtained a referral to a mental health specialist and gathered more detailed medical documentation about her son's disability, including a second medical letter. (A.A. 123-26, 132.) However, on October 20, before Ms. Kelly could provide this further information, the landlord filed a motion to reinstate its now-dismissed case and to request the entry of a nonredeemable judgment for possession based on Ms. Kelly's alleged breach of the parties' agreement. (A.A. 36-52.)

The landlord's motion was heard before the presiding judge in the Landlord and Tenant Branch (K. Christian, J.) on November 30, 2010. The landlord introduced evidence that (1) Ms. Kelly had provided a medical letter to the landlord within the required timeframe under the parties' agreement, but the landlord deemed this letter insufficient; and (2) there was a single occasion after the settlement agreement went into effect when Ms. Kelly's son failed to muzzle the dog inside the apartment building. (A.A. 53-75.) After hearing evidence, the court reinstated the case and orally ruled in favor of the landlord's request for judgment. (A.A. 56-58, 91-95.) The following day, the court issued a written order entering a nonredeemable judgment for possession based on Ms. Kelly's failure to comply with the parties' settlement agreement. (A.A. 97-99.) The trial court found that: (1) Ms. Kelly had failed to provide the landlord with appropriate documentation of the

medical necessity of the dog for her son, and, specifically, that the letters Ms. Kelly provided did not indicate a present need for the dog or explain the nexus between her son's disability and the dog; and (2) Ms. Kelly failed to muzzle the dog or require her son to do so at all times when not in the apartment. *Id.* The trial court's order also required Ms. Kelly to "immediately remove her dog from [the landlord's] property and not to bring the dog onto the property again." (A.A. 100-101.)

After receiving this order, Ms. Kelly retained her present counsel to represent her in filing a motion to alter or amend the judgment pursuant to Super. Ct. Civ. R. 59, which she filed on December 15, 2010. (A.A. 102-35.) The motion cited two grounds for reconsideration: (1) Ms. Kelly's reasonable accommodation defense; and (2) the trial court's failure to consider other, appropriate remedies short of a nonredeemable judgment for possession. *Id.* After hearing oral argument on both of these issues (A.A. 144-83), the trial court entered an order denying the motion to alter or amend on January 19, 2011 (A.A. 184-92). The trial court rejected again Ms. Kelly's reasonable accommodation defense, an issue not appealed to this Court. (A.A. 186-90.) As to the remedy imposed, the trial court affirmed the entry of a nonredeemable judgment for possession for Ms. Kelly's breach of the parties' settlement agreement. (A.A. 190-92.) While recognizing that forfeiture of a lease is disfavored, the trial court simply noted that forfeiture may be warranted where the landlord gave the tenant notice of an alleged breach and a reasonable opportunity to comply. *Id.*

The trial court did not explain or address the source of its authority to enter a judgment for possession against Ms. Kelly. (A.A. 184-92.) Nor did the trial court indicate that it had considered any sanction short of the entry of judgment. *Id.* The trial court also did not discuss any of the specific circumstances of this case, including the availability of alternative, less drastic sanctions to make the landlord whole. *Id.* Nor did the trial court address the fact that the entry of judgment in

this case also would result in terminating Ms. Kelly's housing subsidy, her only present means of providing safe and affordable housing for herself and her son. *Id*.

Ms. Kelly moved for a stay pending appeal, supported by declarations that she had found a new home for the dog and would not bring any dog onto the premises in the future. On April 18, 2011, the trial court (Duncan-Peters, J.) granted a stay pending appeal. (A.A. 193-201.) The court found that Ms. Kelly had demonstrated "a substantial case on the merits" as to "whether it is appropriate to enter a nonredeemable judgment for possession where the settlement agreement entered into by the parties through OHR does not set forth a clear remedy in case of a breach by [the tenant]." (A.A. 200.)

SUMMARY OF ARGUMENT

The trial court in this case erred as a matter of law by entering a nonredeemable judgment for possession against the tenant, Kim Kelly, based on her alleged breach of a settlement agreement that does not authorize this remedy. The landlord and Ms. Kelly settled a dispute about her alleged violation of a lease provision prohibiting pets and her defense that she should be allowed to keep the pet as a reasonable accommodation for her son's disability by entering a settlement agreement before the District of Columbia Office of Human Rights. On the trial date in their pending landlord-tenant case, the parties filed a praecipe to dismiss that case, attaching a copy of the settlement agreement. The praecipe also provided that the landlord could enforce any breach of the agreement in the landlord-tenant case. When a dispute later arose about whether Ms. Kelly had complied with her obligations under the agreement, the landlord filed a motion to reinstate the case and enter a nonredeemable judgment for possession, which the trial court granted.

The trial court had no authority to grant this relief, however, because the parties' settlement agreement did not provide any express or implicit authority for this remedy, did not include a consent judgment or a confession of liability, and was not entered as a court order. The trial court's authority thus was limited to enforcing the parties' settlement agreement as a private contract. Because neither the terms of the agreement itself nor any general principle of contract law provides for the entry of a nonredeemable judgment for possession as a remedy under these circumstances, the trial court lacked authority to grant this relief based on a breach of the settlement agreement. The agreement in this case was not a court order that might have made available broader judicial sanctions for an alleged breach. Nor did the landlord establish or the trial court make the type of findings that are required under Rule 60(b)(6) to set aside the parties' agreement, vacate the consent dismissal, and proceed to a trial on the merits that might have resulted in a judgment for possession. Because the trial court had no authority to enter a nonredeemable judgment for possession, that judgment must be set aside.

Even if the trial court had authority to enter such a judgment, it was an abuse of discretion to do so in this case, because the trial court had effective remedies short of judgment to make the landlord whole and avoid the substantial hardship to Ms. Kelly from eviction. The trial court in fact imposed such a remedy by ordering Ms. Kelly to remove her dog from the landlord's property immediately. There is simply no indication or finding in the record as to why this remedy was not sufficient, in and of itself, to address Ms. Kelly's alleged breach and make the landlord whole. Imposition of this lesser remedy is particularly appropriate here, where Ms. Kelly initially did not avail herself of her right under District of Columbia law to cure her lease violation by removing the dog, based on her good faith belief that she was entitled to keep the dog as a reasonable accommodation for her son's disabilities. A tenant should have the

right to pursue a good faith reasonable accommodation defense without surrendering the right to cure if that defense ultimately fails. Imposition of a lesser remedy also is appropriate in this case, because the entry of a judgment for possession against Ms. Kelly had the effect of working a double forfeiture, by depriving her not only of her home, but also of a housing subsidy that is vital to her ability to avoid homelessness for herself and her son. Because a lesser remedy was available that would have made the landlord whole while avoiding this substantial hardship to Ms. Kelly, the trial court abused its discretion by instead entering a nonredeemable judgment for possession.

ARGUMENT

I. The Trial Court Had No Authority to Enter a Nonredeemable Judgment for Possession.

The trial court had no authority to enter a nonredeemable judgment for possession against Ms. Kelly under her settlement agreement with her landlord. The parties' settlement agreement did not include a consent judgment in favor of the landlord, *cf. Puckrein v. Jenkins*, 884 A.2d 46 (D.C. 2005), nor was it converted into a court order subject to enforcement to vindicate the court's own authority rather than the contractual expectations of the parties, *cf. Giles v. Crawford Edgewood Trenton Terrace*, 911 A.2d 1223, 1224-25 (D.C. 2006). Unlike a court order, a settlement agreement is simply a contract between the parties that must be construed according to its terms. *See, e.g.*, *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 188-91 (D.C. 2009). Nothing in the settlement agreement nor the praecipe filed with it provided any express or implicit authority for the entry of a judgment for possession against Ms. Kelly. *Cf. Brown v. Hornstein*, 669 A.2d 139, 142-43 (D.C. 1996). Nor is there any general contract law principle that could be invoked to support such a remedy. Although the landlord styled its motion as a request to reinstate the complaint, which could have allowed the trial court to vacate the parties'

agreement and proceed to a trial on the merits, this type of extraordinary relief would have required the landlord to make the necessary showing to vacate the dismissal under Super. Ct. Civ. R. 60(b)(6). The landlord did not do so and the trial court did not so find.

A. The Trial Court's Authority Was Limited to Enforcing the Settlement Agreement of the Parties As a Private Contract.

Once the landlord and tenant reached an agreement to settle their claims and the trial court dismissed the landlord's complaint, the landlord-tenant case was over. As the Supreme Court explained in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994), the enforcement of a settlement agreement entered as a condition of the dismissal of a lawsuit pursuant to Rule 41[2] is not a continuation of the old case, but rather an adjudication of a new suit for breach of contract.[3] "The short of the matter is this: The suit involves a claim for breach of a contract part of the consideration for which is dismissal of an earlier [Superior Court] suit." *Id*. Or, as Judge Posner put it, "[t]he settlement is just another contract to be enforced in the usual way, that is, by a fresh suit." *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002). Thus, when the landlord in this case invoked the Landlord and Tenant Branch's authority to enforce the parties' settlement agreement, the trial court was limited to imposing only those remedies authorized by the agreement itself or by the law of contracts. *See, e.g., In re Estate of Drake*, 4 A.3d 450, 453 (D.C. 2010) (noting that courts enforce settlement agreements "just like any other contract"); *Tsintolas Realty*, 984 A.2d at 188 (same); *Dyer v. Bilaal*, 983 A.2d 349, 354 (D.C. 2009) (same). Neither the parties' agreement in this case nor the law of contracts authorized the

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[2] In *Boks v. Charles E. Smith Mgmt, Inc.*, 453 A.2d 113, 114 n.1 (D.C. 1982), this Court noted that it would construe Superior Court Civil Rule 41 – the basis for the parties' stipulated dismissal in this case - in light of the federal rule.

[3] The issue in *Kokkonen* was whether the federal courts had jurisdiction to enforce a settlement agreement. The Supreme Court held that independent jurisdiction over the contract action was required (but lacking in that case) unless the court had reserved jurisdiction to enforce the agreement. *See* 511 U.S. at 378-81.

trial court to enter a non-redeemable judgment for possession as a remedy. Accordingly, that judgment must be set aside.

Settlement agreements are construed under general principles of contract law, and the trial court therefore may "enforce a valid and binding settlement agreement just like 'any other contract.'" *Tsintolas Realty*, 984 A.2d at 188 (quoting *Dyer*, 983 A.2d at 354). The trial court retains jurisdiction to consider a motion for enforcement where the matter remains pending before the court or where the parties have provided for continuing jurisdiction in their agreement. *See, e.g.*, *Confederate Mem'l Ass'n, Inc. v. United Daughters of the Confederacy*, 629 A.2d 37, 39 (D.C. 1993) (holding that trial courts retain jurisdiction to enforce settlement agreements entered before them, at least where the underlying case remains pending); *Kokkonen*, 511 U.S. at 378-82 (noting that federal courts may retain jurisdiction over a claim for breach of a settlement agreement, following a voluntary dismissal, if the stipulation of dismissal explicitly provides for ongoing jurisdiction for purposes of enforcement). Thus, the provision in the praecipe authorizing the landlord to "enforce the agreement in this case" allowed the landlord to enforce the settlement agreement in the Landlord and Tenant Branch without having to file a new civil action. The fact that the contract action was heard in the dismissed landlord-tenant case did not change the nature of the action – for breach of contract – or expand the available contract remedies. Adjudicating an alleged breach of the settlement agreement also did not revive the landlord-tenant case, which had been dismissed and could be reopened only in accordance with Rule 60(b)(6).

As in any contract action, the court's authority in enforcing a private settlement agreement is limited by general principles of contract law and the terms of the agreement itself. *See, e.g.*, *Tsintolas Realty*, 984 A.2d at 188-91 (reversing in part where the trial court's

consideration of claims of mutual breach included an issue not covered by the parties' settlement agreement); *Confederate Mem'l Ass'n*, 629 A.2d at 39 (affirming trial court's order for specific performance of items under the parties' settlement agreement). The District of Columbia follows the objective law of contracts: the plain meaning of the written language adopted by the parties governs their rights and duties, regardless of their subjective intent. *See, e.g.*, *Tsintolas Realty*, 984 A.2d at 190; *Dyer*, 983 A.2d at 354-55.

In this case, the parties' agreement is unambiguous, and it does not authorize the entry of a judgment for possession against Ms. Kelly. Neither the praecipe filed with this Court nor the attached agreement entered with the Office of Human Rights provides for the entry of a judgment for possession under any circumstances. (A.A. 25-31.) Indeed, neither document specifies anything about remedies in the event of a breach. The praecipe itself states that if "Defendant fails to abide by this agreement, Plaintiff may enforce the agreement in this case." (A.A. 25.) The settlement agreement contains a single sentence regarding enforcement, which references D.C. Code § 2-1403.07, a provision which authorizes the Attorney General to seek injunctive relief and is simply inapplicable to the instant case. (A.A. 31.) "When an agreement is complete on its face, and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself." *Fritz v. Gise*, 797 A.2d 710, 713-14 (D.C. 2002) (quoting *Berry v. Klinger*, 300 S.E.2d 792, 796 (Va. 1983)).

In the order denying Ms. Kelly's motion to alter or amend the judgment, the trial court pointed to a separate provision in the parties' settlement agreement stating that the agreement "shall be interpreted and enforced in accordance with the laws of the District of Columbia, without reference to its conflicts of laws and provisions." (A.A. 31.) This language is simply a choice-of-law provision; it says nothing about the specific remedy that would follow if Ms. Kelly

breached the agreement. *Cf., e.g., Melun Indus. v. Strange*, 898 F. Supp. 995. 999 (S.D.N.Y. 1992) (describing language that the contract "shall be governed by and construed, interpreted and enforced in accordance with the law of the State of New York" as an "unqualified" and "unambiguous" choice-of-law provision). Indeed, by including a choice-of-law provision without specifying any remedies for breach, the parties evinced their intent that questions about enforcement and remedies for breach would be decided under general principles of contract law in the District of Columbia. For this reason, the agreement's silence as to any specific remedy for an alleged breach by Ms. Kelly also does not render the contract incomplete or ambiguous.

Even if the trial court could have considered extrinsic evidence of the surrounding circumstances and the course of conduct of the parties, such evidence does not support a finding that the agreement authorizes the entry of a judgment for possession for its breach. *See, e.g., Waverly Taylor, Inc. v. Polinger,* 583 A.2d 179, 182 (D.C. 1990) (noting that where a contract is ambiguous, the court may consider extrinsic evidence such as the circumstances surrounding the contract and the course of conduct of the parties). The agreement was entered before the Office of Human Rights to resolve Ms. Kelly's request for a reasonable accommodation to her landlord. The parties agreed that Ms. Kelly would resubmit her request, along with additional medical documentation, and that her landlord would consider it. (A.A. 26-31.) In other words, they agreed to engage in the kind of "interactive process" contemplated under fair housing law for the resolution of Ms. Kelly's reasonable accommodation request. *See, e.g., Douglas v. Kriegsfeld*, 884 A.2d 1109, 1122 n.22 (D.C. 2005) (reviewing case law requiring parties to engage in an "interactive process" to resolve a reasonable accommodation request). The parties' subsequent conduct – in which Ms. Kelly submitted her request, the landlord asked for more information,

and she then sought to provide this additional information – reflects this understanding of the agreement. (A.A. 119, 123-26, 132.)

Finally, even if the trial court had found the settlement agreement ambiguous, the court still was obliged to construe this ambiguity against the drafter, the landlord. *See Am. Bldg. Maintenance Co. v. L'Enfant Plaza Props.*, 655 A.2d 858, 862 (D.C. 1995); *see also Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151, 1160 (D.C. 1985) (noting that a lease must be construed strictly against a party seeking forfeiture). Application of this principle is particularly appropriate here, where the drafter, represented by counsel throughout the proceeding, is seeking to enforce the agreement against a pro se party. Notably absent from the agreement was a confession of judgment, although such provisions are common features of settlements negotiated in landlord-tenant cases. Counsel for the landlord also could have proposed an additional clause for enforcement by entry of a judgment for possession for any alleged breach by Ms. Kelly but did not do so. *Cf. Brown*, 669 A.2d at 142-43 (affirming the entry of a judgment for possession against a tenant where the parties' settlement agreement provided for this remedy on motion by the landlord). There is no basis to infer Ms. Kelly's agreement to such a harsh consequence from the language of the settlement.

Absent a specific provision authorizing the entry of a judgment for possession against Ms. Kelly for breach of the parties' agreement, the trial court could impose such a remedy only if it found support in general principles of contract law. The agreement already incorporates these background principles – specifically, the laws of the District of Columbia, as specified in the choice-of-law provision. Possible contract remedies for an alleged breach include an award of monetary damages or an order for specific performance. *Cf. George Washington University v. Weintraub*, 458 A.2d 43, 47 (D.C. 1983) (discussing contract remedies in the context of breach

of the implied warranty of habitability). The trial court certainly could have awarded monetary damages, if any, to the landlord flowing from Ms. Kelly's alleged breach of the settlement. *See, e.g.*, *id*. (holding that a tenant may sue for damages based on the landlord's breach of the lease). The court also could have ordered Ms. Kelly to perform her promises: to provide required information to her landlord and to muzzle her dog. *See, e.g.*, *Confederate Mem'l Ass'n*, 629 A.2d at 39 (affirming trial court's order for specific performance of items under the parties' settlement agreement).[4] But there is no principle of contract law that would authorize the entry of a judgment for possession against Ms. Kelly based on her alleged failure to keep her promises under the settlement agreement.

Instead of looking to the parties' agreement or background principles of contract law, the trial court here simply rewrote the contract to impose a new remedy. This it cannot do, and the judgment must be set aside.

B. The Settlement Agreement Is Not an Order of the Court.

Had the parties' settlement agreement been entered as a court order, the trial court could have considered the full range of judicial sanctions available to it for enforcing such an order. *See*, *e.g.*, *Giles*, 911 A.2d at 1224-25 (remanding for a hearing on appropriate civil contempt sanctions, where a tenant alleged a breach of an agreement entered as a consent order). Similarly, "[a] consent judgment is an order of the court, indistinguishable in its legal effect from

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[4] In considering these possible remedies, the trial court would have to determine whether any breach by Ms. Kelly was material and whether the landlord suffered any harm. *See, e.g.*, *Tsintolas Realty*, 984 A.2d at 187 (denying landlord any relief based on its claim for breach of settlement agreement where it failed to establish any resulting damages). The evidence introduced by the landlord established only two possible instances of breach. First, Sean Kelly failed to keep the dog muzzled on a single occasion. Second, although Ms. Kelly provided "medical documentation" within the 10 days required under the agreement, the landlord did not deem the documentation "appropriate," and Ms. Kelly then took steps to gather additional documentation to satisfy the landlord. (A.A. 53-75.) These facts do not support a finding that the landlord suffered any material damages as a result.

any other court order, and therefore subject to enforcement like any other court order." *Puckrein*, 884 A.2d at 54.

To convert an agreement to a court order enforceable by the full panoply of judicial sanctions, however, the trial court must do more than approve the agreement. "[A] settlement agreement which has been approved and signed by the court, but which has not been framed as an order or a judgment, remains an agreement only, and may be enforced by an action for breach of contract but not by contempt." *D.D. v. M.T.*, 550 A.2d 37, 48 (D.C. 1988). This is true even if the judge's signature bears words such as "so ordered." *See id*. at 48-49. To allow for future judicial enforcement as a court order, not simply a private contract, the trial court must do more than approve or acknowledge the parties' agreement – it must specifically command or enjoin particular conduct by the parties. *See id*.; *see also Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 370-71 (10th Cir. 1996) (holding that broader judicial sanctions are available only where the provisions of the parties' agreement are set forth in a separate court order). The fact that a settlement agreement includes a stipulation of dismissal or specifies that the trial court will retain jurisdiction over any claim of breach – as in the instant case – is insufficient. *See, e.g., Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916-17 (2d Cir. 1998) (holding that contempt sanctions are unavailable for a stipulated dismissal order under Fed. R. Civ. P 41(a) based on a settlement agreement); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460-61 (7th Cir. 1993) (same where the stipulated dismissal order specified that the trial court would retain jurisdiction over any claim of breach).

Although the trial court below did not tie the entry of judgment to its contempt power, it did erroneously conclude that because the agreement had been approved and signed by the presiding judge in the Landlord and Tenant Branch, it was a "court order." (A.A. 58.) The

presiding judge's signature simply acknowledges and approves of the parties' settlement. The documents filed were captioned as a praecipe and a settlement agreement, not a court order; they were so entered on the docket and treated by the presiding judge who approved them as such; and there is no indication in the record that either the parties or the court intended to treat the documents as a court order. (A.A. 13, 25-31, 32-35.) *Cf. D.D.*, 550 A.2d at 49. Because the trial court itself did not order or enjoin any particular conduct by the parties, but instead merely approved the parties' agreement, it remains a private contract for which broader, judicial sanctions are not available.[5]

C. The Trial Court Did Not, and Could Not, Vacate the Dismissal of the Landlord's Complaint Pursuant to Rule 60(b)(6) In the Absence of Findings That It Did Not Make.

Ultimately, the trial court below substituted the remedy that had been sought in the landlord's original complaint – a judgment for possession – for the more limited set of contract remedies available under the parties' settlement agreement. There is only one conceivable procedure that might have empowered the trial court to do so: by vacating the parties' agreement, reinstating the underlying landlord-tenant case, and allowing the parties to proceed to a trial on the merits. The landlord's motion was styled to seek precisely this relief. To grant such extraordinary relief, however, would have required the landlord to request and the trial

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[5] Even if the parties' agreement had been converted into a court order, the entry of a judgment for possession against Ms. Kelly nonetheless would be unjustified and excessive. Before imposing judgment as a sanction to enforce a court order, the trial court first must consider whether lesser sanctions are sufficient to coerce compliance with the court's order. *See, e.g., Loewinger v. Stokes*, 977 A.2d 901, 916 (D.C. 2009) (requiring consideration of lesser sanctions in the context of civil contempt); *Boone v. Cedro Ltd.*, 908 A.2d 1165, 1167 (D.C. 2006) (same in the context of a discovery violation, noting that the trial court's failure to do so constitutes an independent ground for reversal). This type of analysis and findings are absent in the record below. (A.A. 53-99.) Without any showing by the landlord or finding by the court that lesser sanctions were insufficient to compel further compliance by Ms. Kelly, the entry of judgment as a judicial sanction would have been an abuse of discretion, even if this had been the trial court's intention.

court to grant a motion for relief from the final judgment – in this case, a voluntary dismissal by consent – based on a showing pursuant to Super. Ct. Civ. R. 60(b)(6). Rule 60(b)(6)'s "stringent" standard requires a "showing of unusual or exceptional circumstances." *Puckrein*, 884 A.2d at 60. In *Puckrein*, this Court joined those federal courts which hold that "a breach of a settlement agreement in itself, where a remedy is available for enforcement, does not present the extraordinary situation contemplated for application of Rule 60 (b)(6) relief." 884 A.2d at 59-60.[6] The trial court here did not cite to Rule 60(b) or "consider the proper factors in granting [the landlord's] motion to reinstate the complaint." *Id.*

Vacatur of the prior dismissal would have put the parties back in the position they were prior to their settlement agreement: awaiting a full trial on the merits. No such trial was ever held in this case, and the evidentiary hearing that the trial court held on November 30, 2010 falls far short of what would have been required. At the very least, Ms. Kelly, a pro se party, should have been given notice that a trial would be held, so that she could have an opportunity to subpoena witnesses and gather relevant evidence – steps that she did not take prior to appearing for the November 30 hearing, because she did not realize that she needed to do so. (A.A. 133.) Moreover, Ms. Kelly would have had the right to present any applicable defenses. Instead, the trial court held a hearing focused on a single issue: whether Ms. Kelly in fact had breached the parties' settlement agreement. Even assuming that the trial court's order entering judgment for possession could be interpreted as vacating the prior dismissal and the parties' settlement agreement and reinstating the case, the court still erred as a matter of law by entering a judgment

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[6] There is a split of authority among federal courts about whether an alleged breach of a settlement agreement is sufficient to warrant vacating a dismissal and reopening the case. *See Puckrein*, 884 A.2d at 57 n.13 (citing cases). This question carries added significance for federal courts, because they are courts of limited jurisdiction, which typically do not have authority otherwise to adjudicate a contract claim for breach of a settlement agreement.

for possession without holding a full trial on the merits. Nothing in the settlement agreement entitled the landlord to take a shortcut to judgment if it elected to revive the landlord-tenant case rather than enforcing its contract.

II. The Entry of a Judgment for Possession Was an Abuse of Discretion Even If the Trial Court Had the Authority to Do So.

The trial court was bound in the exercise of its discretion to consider the individual circumstances of this case. The eviction of Ms. Kelly from her subsidized housing, rather than simply ordering her to remove her pet, was an abuse of discretion. In this case, the trial court had effective remedies available short of a nonredeemable judgment for possession. The trial court failed to recognize or consider any of the relevant factors that should have informed its analysis of the appropriate remedy for Ms. Kelly's breach. Under these circumstances, this Court should hold that the trial court abused its discretion by entering a nonredeemable judgment for possession against Ms. Kelly.

Forfeiture of a lease is disfavored and generally is reserved for material and substantial violations by the tenant. *See, e.g.*, *Yasuna*, 498 A.2d at 1161. In *Yasuna*, this Court cautioned that forfeiture should be reserved for circumstances in which the obligation at issue is clearly defined, the landlord has acted promptly, and the result of forfeiture will not be unconscionable. *Id*. at 1160. The Court then described specific factors that trial courts should consider in weighing whether forfeiture of a lease is appropriate: whether either party has violated fundamental principles of fair dealing, the prejudice resulting to the landlord from the breach, whether the result was willful or instead a result of inadvertence or mistake, whether the tenant has acted in good faith, whether the breach is substantial, and whether there are alternative and less drastic means to make the landlord whole, for example, through injunctive relief. *Id*. at 1160-61. As this Court explained further in *Shapiro v. Tauber*, a case which followed and relied

on *Yasuna*: "the judge's authority to award possession must rationally include the lesser power to require restoration of the premises to the condition called for by the lease – precisely as an alternative to the disfavored remedy of forfeiture." 575 A.2d 297, 300 (D.C. 1990) (holding that forfeiture was not warranted where the tenant acted in good faith, forfeiture would result in substantial hardship to the tenant, and alternative sanctions were available).

In this case, two of the factors discussed in *Yasuna and Shapiro* are particularly relevant: whether less drastic remedies could make the landlord whole, and whether forfeiture would result in a severe hardship to the tenant.[7] Both of these factors point to an alternative remedy – requiring Ms. Kelly to remove her dog but allowing her to remain as a tenant – which would have made the landlord whole while avoiding the severe hardship to Ms. Kelly from judgment, which would result in the loss of not only her home, but also her housing subsidy, the only means she has to provide safe and stable housing for her family.

A. Ordering Ms. Kelly to Remove Her Dog Was an Adequate Remedy.

Among the factors that a court must consider before imposing forfeiture on a tenant is whether there are other, less drastic remedies for making the landlord whole. *Yasuna*, 498 A.2d at 1160-61. In this case, neither the proceedings on the record in open court nor the written order issued by the trial court provide any indication that the court considered lesser sanctions against Ms. Kelly. (A.A. 53-101.) This total absence of analysis is all the more surprising, because such a remedy existed and, indeed, was ordered by the trial court: injunctive relief for Ms. Kelly to

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[7] There is no indication in the record that the trial court considered other relevant factors discussed in *Yasuna*, such as whether the tenant acted in good faith, whether the breach was substantial, and the prejudice to the landlord. *See* 498 A.2d at 1160-61. The absence of any such discussion is notable, because there was ample evidence that Ms. Kelly acted in good faith in pursuing – albeit unsuccessfully, in the trial court's view - a reasonable accommodation defense, and that she made substantial, good-faith efforts to comply with the parties' settlement agreement by gathering medical documentation and successfully keeping her dog muzzled on all but one occasion, thereby minimizing any prejudice to the landlord. (A.A. 119-35.)

remove her dog from the landlord's property. (A.A. 100-101.) Ms. Kelly complied with this order and thereby cured her lease violation. There is simply no indication or finding in the record as to why this remedy was not sufficient, in and of itself, to address Ms. Kelly's alleged breach and make the landlord whole. Even when presented squarely with this argument in Ms. Kelly's motion to alter or amend the judgment, the trial court failed to perform the requisite analysis. (A.A. 110-13, 160-67, 190-91.) The trial court's silence about alternatives to eviction, coupled with its failure to explain why such sanctions were rejected if they were considered, constitutes an abuse of discretion. *Cf. District of Columbia v. Greene*, 539 A.2d 1082, 1084 (D.C. 1988) ("While a trial court is not required to state its reasons for choosing dismissal or a default judgment rather than some lesser sanction, a court which fails to state any reasons at all runs a serious risk that its decision will not withstand appellate scrutiny.").

Imposition of the lesser sanction of ordering Ms. Kelly to remove her dog – which amounts to providing the tenant with one final opportunity to cure her lease violation in order to avoid eviction – is particularly appropriate in the circumstances of this case. Ms. Kelly initially did not avail herself of her right under District of Columbia law to cure the alleged lease violation within 30 days, *see* D.C. Code § 42-3505.01(b), because she believed in good faith that she was entitled to a reasonable accommodation and thereby had an absolute defense to the landlord's claim. In these circumstances, a tenant confronting a 30-day notice to correct or vacate faces an unfair choice: either cure the alleged lease violation and thereby lose her right to adjudicate the fair housing defense (at least in the context of the landlord's claim for possession), or stand on her fair housing defense and thereby lose her right to cure. Where a tenant responds to the landlord's 30-day notice to correct or vacate, in lieu of curing, by raising a substantial, good-faith claim that would provide an absolute defense to the landlord's claim for possession,

the policy against forfeiture compels the conclusion that the tenant's right to cure is not extinguished. Otherwise a tenant would have to forego a statutorily-protected defense as the price of avoiding eviction – a result that would itself offend the federal Fair Housing Act and the District of Columbia Human Rights Act. A tenant must have an opportunity to pursue a legitimate reasonable accommodation defense without surrendering the right to cure if the defense fails.

This requirement to offer a renewed right to cure under these and similar circumstances is grounded in the same principles of equity outlined in *Yasuna*, notably consideration of whether the landlord can be made whole by an alternative and less drastic sanction than eviction. The same considerations of equity underlie this Court's holding in *Trans-Lux Radio City Corp. v. Service Parking Corp.*, 54 A.2d 144, 146 (D.C. 1947), allowing a tenant to avoid forfeiture for nonpayment of rent by tendering payment in full at any time before eviction. Where a tenant's good faith defense has been rejected at trial, and the tenant then has a present ability to cure the lease violation, then in most circumstances – including those present in this case – allowing the tenant to cure will make the landlord whole. In such cases, the tenant's continuing breach of the lease and failure to cure also do not result from the kind of "willfulness – in the sense of disregarding a 'clearly defined' obligation – or bad faith that *Yasuna* deemed significant in justifying forfeiture." *Shapiro*, 575 A.2d at 300 (citing *Yasuna*, 498 A.2d at 1161); *see also Grubb v. WM. Calomiris Invest Corp.*, 588 A.2d 1144 (D.C. 1991) (recognizing the court's authority as a matter of equity to reject forfeiture but finding the trial court did not abuse its discretion by ordering a tenant's eviction where the breach was clear and deliberate). As a matter of equity, a tenant in these circumstances can and should be offered a final opportunity to avoid eviction by curing the lease violation.

B. The Trial Court Failed to Consider the Severe Hardship to Ms. Kelly That Would Result From Eviction.

The trial court also was obligated to weigh the severe hardship that would result to Ms. Kelly from eviction. In the circumstances of this case, the entry of a judgment for possession against Ms. Kelly had the effect of working a double forfeiture: she lost not only her home, but also a housing subsidy that is critical to her ability to avoid homelessness.

Ms. Kelly and her landlord are participants in the federal project-based section 8 program, which allows Ms. Kelly to pay an affordable rent based on her income. (A.A. 102, 111-12, 161.) The housing subsidy under this program is tied to the building, such that a tenant like Ms. Kelly who is evicted from her apartment also loses her housing subsidy. *See generally* 42 U.S.C. § 1437f(b), (g); 24 C.F.R., parts 880-81, 883-84, 886, 891. Ms. Kelly receives only limited income in the form of Temporary Assistance to Need Families (TANF) benefits. (A.A. 111, 161.)[8] These public benefits simply are not sufficient to pay rent for an apartment on the private market. As a result, Ms. Kelly's eviction and the loss of her housing subsidy would be almost certain to render her and her son homeless and without sufficient resources to secure safe, stable housing. The trial court gave no indication that it considered these facts. (A.A. 53-101.)

This type of severe hardship resulting to the tenant from eviction must be considered in weighing whether forfeiture of the lease is an appropriate remedy. In *Shapiro v. Tauber*, relying on *Yasuna*, this Court cited the "severe hardship" that would result to tenants from forfeiture of the lease in holding that forfeiture was not warranted. *See* 575 A.2d at 300. In that case, commercial tenants were only 15 months into a 25-year lease and they already had invested

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[8] In addition to making a general proffer about her financial circumstances and the potential impact of losing her housing subsidy in her Motion to Alter or Amend the Judgment, Ms. Kelly presented full information about her income to the trial court in her Application to Proceed Without Prepayment of Costs, which was granted by the trial court before the Motion was filed. (A.A. 10-11.)

substantial resources into the premises, which they would lose if they lost possession. *Id*. In the instant case, by ordering Ms. Kelly to be evicted from her home, the trial court also ordered the loss of her housing subsidy, a public benefit that is vital to her ability to provide stable and secure housing for herself and her son. The trial court abused its discretion by failing to consider these circumstances before entering a judgment for possession. (A.A. 190-91.)[9]

CONCLUSION

For the foregoing reasons, the judgment for possession should be vacated.

Respectfully submitted,

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[9] Ms. Kelly did not expressly raise this argument with the trial court until she retained counsel and filed her motion to alter or amend the judgment. However, the complaint filed in this case states that the housing is subsidized, with Ms. Kelly only paying $116 toward the monthly rent of $1,223, providing some notice to the trial court of this issue. (A.A. 17.) In any event, even when squarely presented with this argument, the trial court failed to provide any indication that it had considered or weighed this factor.

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, this 10th day of May, 2011, to:

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