No. 07-CV-406

DISTRICT OF COLUMBIA COURT OF APPEALS

BORGER MANAGEMENT, INC.,

Appellant,

v.

CAROLYN NELSON-LEE,

Appellee.

On Appeal From The Superior Court Of The District Of Columbia,
Civil Division, Landlord And Tenant Branch

BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA

Beth Mellen Harrison (#497363)
Barbara McDowell (#414570)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
PH: (202) 628-1161

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

LEGISLATIVE MATIERALS:

MISCELLANEOUS:

* Cases principally relied upon

INTEREST OF THE AMICUS CURIAE

The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs." Legal Aid By-Laws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal-services program in the District of Columbia. Housing law is among Legal Aid's principal practice areas.

INTRODUCTION & SUMMARY OF ARGUMENT

The instant case is an appeal from a decision of the Landlord Tenant Branch of the D.C. Superior Court dismissing the landlord's claim for possession. Appellant, Borger Management, is the landlord for the property located at 60 Hawaii Avenue, N.E., Washington, D.C. Appellee, Carolyn Nelson-Lee, is a tenant of the landlord at the property. The landlord sued Ms. Nelson-Lee seeking possession of the apartment based on a Notice to Quit dated November 28, 2006, which alleges that Ms. Nelson-Lee violated her lease by interfering with other residents' quiet enjoyment of the property. Notice to Quit [Appellant's App. A5]; 3/16/07 Tr. at 4, 8-9. Ms. Nelson-Lee requested a bench trial to contest these allegations, which was scheduled for March 16, 2007. 3/16/07 Tr. at 3.[1]

The landlord previously had issued a Notice to Cure or Quit to Ms. Nelson-Lee dated June 2, 2006 citing similar allegations and providing a 30-day period to correct the alleged violation. Notice To Cure Or Quit [Appellant's App. A1]. The landlord conceded before the trial court that Ms. Nelson-Lee in fact corrected the violation during the 30-day cure period provided by the initial notice. 3/16/07 Tr. at 8-9. Following the expiration of the cure period,

---

[1] Because the trial court dismissed the landlord's claim sua sponte before trial, neither party was able to present testimony or other evidence to the court. None of the allegations presented in Appellant's Brief regarding complaints from William Dawes, another neighbor on the property, or Mr. Dawes' legal proceedings with the landlord were before the trial court.

however, the landlord contended that the violation by Ms. Nelson-Lee recurred. Notice To Quit [Appellant's App. A5]; 3/16/07 Tr. at 8-9. Rather than serving a new notice to correct or vacate with a new opportunity to cure, the landlord simply issued a notice to quit and proceeded to file a complaint for possession. Citing the landlord's concession that Ms. Nelson-Lee had corrected her alleged violation within the 30-day cure period provided under the initial notice, the trial court dismissed the landlord's claim for possession. 3/16/07 Tr. at 12. The trial court concluded that the landlord had not met the requirements of the Rental Housing Act, because the landlord failed to provide Ms. Nelson-Lee with a new notice to correct or vacate and another opportunity to correct what amounted to a new lease violation. Id. at 12-13. This appeal followed.

The plain language of the Rental Housing Act requires a landlord seeking eviction for a lease violation to provide the tenant with a 30-day notice and an opportunity to correct the violation before filing suit. This plain language reading of the statute has been followed by the D.C. Superior Court in lease violation cases. It effectuates the purpose of the Rental Housing Act – to protect tenants from arbitrary and unjust evictions – by ensuring that tenants receive fair notice and a meaningful opportunity to avoid eviction. By allowing the trier of fact to make individualized factual determinations in each case regarding whether a tenant has corrected an alleged lease violation, this interpretation also is practical, workable, and avoids absurd or unjust results.

The landlord argues that this Court should waive the statutory requirement of notice and an opportunity to correct in cases where the landlord alleges that a lease violation has recurred following a correction. This Court should reject this invitation to read a new limitation into the Rental Housing Act that is directly contrary to the statutory text. Rather than creating a new exception, evidence of a recurrence of a lease violation can and should be weighed by a trier of

fact in determining whether a tenant has corrected the violation cited in the 30-day notice. In considering such evidence, the trier of fact may be inclined to consider factors such as the passage of time, the reason for and willfulness of a subsequent violation, and the degree of recurrence. Allowing the trier of fact to engage in this type of case-by-case factual analysis avoids the absurd results posited by the landlord and allows for a common-sense and fair resolution of each case.

Following the landlord's approach, by contrast, could lead to absurd and unjust results, by denying a tenant a new opportunity to correct simply because she previously had been accused of a similar lease violation, or allowing a landlord to seek eviction on an old notice years after its issuance. Importing a broad wavier into the statute also would deprive the trier of fact of its ability to make equitable determinations based on the facts of individual cases. This Court should reject an interpretation of the Rental Housing Act that is directly contrary to the plain language of the statute and risks absurd and unjust results. In the instant case, the landlord failed to comply with the statutory requirement of notice and an opportunity to correct before suing to evict Ms. Nelson-Lee. Accordingly, this Court should affirm the trial court's dismissal of the landlord's claim for possession.

ARGUMENT

I. A LANDLORD SEEKING POSSESSION BASED ON AN ALLEGED LEASE VIOLATION IS REQUIRED TO PROVIDE NOTICE AND AN OPPORTUNITY TO CORRECT IN ALL CASES.

A. The Rental Housing Act Requires A Landlord To Serve A 30-Day Notice To Correct And Provide An Opportunity To Correct In All Lease Violation Cases.

Under District of Columbia law, a landlord seeking to evict a residential tenant must show that it has "gained the right to evict the tenant under [the Rental Housing Act]." Suggs v. Lakritz Adler Mgmt., LLC, 933 A.2d 795, 798 (D.C. 2007). Among the grounds for eviction

authorized under the Act, a landlord may recover possession of a rental unit "where the tenant is violating an obligation of tenancy and fails to correct the violation within 30 days after receiving from the housing provider a notice to correct the violation or vacate." D.C. Code 42-3505.01(b). For eviction cases based on an alleged lease violation, the notice to correct must contain "a statement detailing the reasons for the eviction," id. 3505.01(a), and "specify what actions need to be taken by the tenant to avoid an eviction." 14 D.C.M.R. 4301.2. The Act mandates that "no tenant shall be evicted from a rental unit * * * unless the tenant has been served with a written notice to vacate which meets the requirements of [the Act]." D.C. Code 42-3505.01(a). Service of a legally sufficient notice thus is "a condition precedent to a landlord's suit for possession." Moody v. Winchester Mgmt. Corp., 321 A.2d 562, 563 (D.C. 1974); see also Russell v. HUD, 836 A.2d 576, 578 (D.C. 2003) (noting that the courts have "rigorously enforced" the requirement of "service of a legally sufficient notice").

The requirements of the Rental Housing Act for proceeding with a lease eviction case are plain, unambiguous, and admit of only one meaning. A landlord is required, in every lease violation case, to prove that (1) the tenant violated the lease; (2) the tenant was served with a legally sufficient notice to correct or vacate; and (3) the tenant failed to correct the violation during the 30-day period offered by the notice. D.C. Code 42-3505.01(b). The Act admits of no exceptions to the requirement of notice and an opportunity to correct when the landlord alleges—as in the instant case—that a lease violation has recurred following an initial cure period.

"[I]n determining the meaning of a statute, [the court] must examine first its language to determine if it is plain and admits of no more than one meaning." Sullivan v. District of Columbia, 829 A.2d 221, 224 (D.C. 2003) (internal quotations omitted). When examining the plain language, the words "should be construed according to their ordinary sense and with the

meaning commonly attributed to them." Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 753 (D.C 1983) (en banc). "[The] court will look beyond the ordinary meaning of the words of a statute only where there are persuasive reasons for doing so." Sullivan, 829 A.2d at 224 (internal quotations omitted). Such reasons include ambiguities in the statute, a plain language reading that produces absurd or plainly unjust results, or an alternative reading that is necessary to effectuate the statute's purpose. See Peoples Drug Stores, 470 A.2d at 754. The plain language of the Rental Housing Act demands a 30-day notice and an opportunity to correct in each lease violation case. Moreover, for the reasons stated below, this plain language reading is the only interpretation that avoids absurd and unjust results and remains true to the purposes of the Act.

Although there are no published decisions on this question, the D.C. Superior Court has adopted this interpretation of the statute. In McGinty v. Dickinson, 117 Daily Washington Law Reporter 1109 (Sup. Ct. 1989) (Kramer, J.), the landlord alleged that the tenant had violated his lease by using a window air-conditioning unit without the landlord's prior consent. The landlord relied on a notice to correct or vacate that had been served a full year earlier for the same alleged violation. See id. 1114-15 [App. A2-A3]. While admitting that the tenant had corrected the lease violation by removing the air-conditioning unit during the 30-day cure period, the landlord alleged that it could sue based on a similar violation taking place the following summer. Id. 1115 [App. A3]. Rather than serving a new notice to correct or vacate, the landlord relied solely on the prior notice and sued to evict. Id. In particular, the landlord pointed to language in the initial notice warning that "a renewal of such violation shall be cause for the landlord to seek possession of your premises without further opportunity on your part to cure a violation." Id.

The trial court entered a directed verdict for the tenant. The court held that the landlord could not state a claim under the Rental Housing Act for a lease violation, because—as the landlord conceded—the tenant did not "fail to correct the violation" within the original cure period. Id. The notice to correct or vacate therefore could not provide the basis for a suit for possession. Id. The court noted that to accept the landlord's argument would "permit[] a tenant only one opportunity to cure a particular type of violation during the entire existence of a tenancy." Id. Such a construction of the statute would be "antithetical to the statute's purpose of protecting the rights of tenants and at odds with the policy disfavoring lease forfeitures." Id.

The plain language reading of the statute followed in McGinty effectuates the District of Columbia Council's purpose in requiring notice and an opportunity to correct in all lease violations cases. The Council enacted the Rental Housing Act with the purpose of creating a "comprehensive legislative scheme to protect the rights of tenants." Administrator of Veterans Affairs v. Valentine, 490 A.2d 1165, 1168 (D.C. 1985). By limiting the allowable grounds for eviction and requiring prior written notice to be served on tenants, the Act "protects tenants from arbitrary and/or retaliatory evictions" and seeks "to eliminate improper attempts to remove low and moderate housing stock from market." D.C. Council, Committee on Housing and Urban Development, Report on Bill 1-157, Rental Accommodations Act of 1975 16 (July 31, 1975) [App. A20]. Requiring notice and an opportunity to correct for lease violations ensures that a tenant will be warned of behavior that places her at risk of eviction and will have a meaningful opportunity to avoid suit by taking steps to correct the behavior. By adopting this requirement for all lease violation cases, the Council struck a sensible balance between protecting the interests of tenants in avoiding eviction and the interests of landlords in protecting their property rights. The requirement of prior notice and a 30-day period to correct is neither onerous nor

prejudicial to the landlord's interest in protecting its property. Indeed, where notice and a 30-day cure period allows the tenant to correct specific behavior, both parties benefit by avoiding the costs and burdens of litigation.

The Act's requirement of prior notice and an opportunity to correct also results in a practical and workable approach that is sensitive to the facts of each individual lease violation case. The plain language of the statute requires the trier of fact to determine in each case whether a tenant has "fail[ed] to correct the violation" within the 30-day cure period. D.C. Code 42-3505.01(b). In addition to considering events that occurred during the cure period itself, the trier of fact may weigh events after the cure period that are relevant to this inquiry. For example, if the landlord alleges that a violation has recurred after the cure period, as in the instant case, the trier of fact must determine if the alleged recurrence is the same "violation" and whether it negates the tenant's argument that she has corrected the lease violation. Id. This plain language interpretation of the statute is sufficiently flexible to allow the trier of fact to engage in an individualized factual inquiry in each case and thus avoid absurd or unjust results.

1. The Passage of Time.

In weighing whether a recurrence of an alleged lease violation negates a tenant's claim to have corrected the violation, a trier of fact might consider a variety of factors. The passage of time between the original violation, the expiration of the cure period, and any subsequent recurrence may be relevant. If a tenant corrects a violation during the 30-day cure period and the violation does not recur for many months, the tenant may be able argue persuasively that the subsequent incident is a new violation rather than evidence of a failure to correct the initial violation. On the other hand, where a violation ceases during the cure period but then restarts

within days or weeks thereafter, the landlord may have a strong argument that the new conduct is part of an ongoing violation that the tenant has failed to correct.

2. The Reason for and Willfulness of the Recurrence.

The reason for any recurrence and whether a new incident is willful or due to inadvertence or neglect also might be considered by the trier of fact. A willful recurrence of a past violation might support a finding that the tenant has failed to correct and is simply continuing past conduct. A new incident caused by mistake or inadvertence, however, might be far less persuasive as evidence of the tenant's failure to correct the initial violation. As the trial court in the McGinty case noted, allowing a tenant a second opportunity to correct following an alleged recurrence of a prior violation is particularly appropriate "where no willful, calculated, and consistent pattern of violations has been shown." 117 Daily Washington Law Reporter at 1116 [App. A4]. Related to the reasons for any recurrence may be evidence of the landlord's waiver or acquiescence in renewal of an alleged violation. If a tenant can show that she acted in good faith to correct a violation, and the landlord then affirmatively waived the issue before later changing course and once again objecting to a subsequent incident, then a trier of fact might be more inclined to conclude that the recurrence should be treated as a new violation rather than a failure to correct.

3. The Degree of the Subsequent Violation.

The number of subsequent incidents or the degree of any recurrence compared to the initial violation also may be relevant to a trier of fact's factual determination. Multiple recurrences of the same violation after the cure period might be used to provide evidence of a continuing pattern that never has been corrected. An isolated incident or a relatively minor recurrence of a formerly major violation, on the other hand, might not be sufficient to persuade a

trier of fact that the tenant has failed to correct. If the tenant acts quickly to address this type of minor or isolated incident, this also might lend support to a finding that the tenant's initial correction was genuine.

Ultimately, the trier of fact must determine whether a tenant's effort to correct an alleged violation amounts to a short-term pause or a long-term cessation, constituting a genuine correction. Put another way, the trier of fact must determine if any new incident fairly can be characterized as a recurrence of a prior violation, rather than a new and distinct violation requiring notice and a new opportunity to correct. Only a true cessation will allow a tenant to claim that she has corrected the violation at issue, as required by the Rental Housing Act. This determination requires an examination of the facts of each individual case, including some or all of the factors outlined above. The plain language of the statute is flexible enough to allow for this carefully individualized inquiry and thus to avoid any absurd or unjust results.

B. This Court Should Reject The Landlord's Attempt To Limit The Statutory Requirement Of Notice And An Opportunity To Correct.

The landlord in the instant case attempts to read a new limitation into the plain language of the Rental Housing Act, by arguing that the statutory requirement of notice and an opportunity to correct should be waived in lease violation cases in which a violation has been corrected and then has recurred. This interpretation is directly contrary to the plain language enacted by the District of Columbia Council. It also is not necessary to ensure fair and workable results. Evidence that a lease violation has recurred should not waive the requirement of notice and an opportunity to cure, but instead should be considered by the trier of fact in determining whether the tenant has correct an alleged violation. Allowing the trier of fact to engage in this type of case-by-case factual analysis preserves the landlord's right to regain possession in appropriate cases, while also protecting tenants from arbitrary and unjust evictions.

The plain language of the statute already allows the trier of fact to consider evidence of any alleged recurrence of a violation as part of its analysis of whether a violation has been corrected. To "correct" means "3. to make conform to a standard" or "5. to cure." Webster's New World Dictionary 312 (2d ed. 1978). To "correct" a behavior requires more than a temporary change of heart; it suggests a long-term alteration with some lasting effect. If a landlord can demonstrate that the tenant only temporarily suspended the violation, rather than ending it, the trier of fact may hold that the tenant has not in fact "corrected" the violation. Presented with evidence of some or all of the factors described above – the passage of time, the reason and willfulness of the recurrence, and the degree of the subsequent violation – the trier of fact can reach a fair result in each individual lease violation case without deviating from the plain language of the statute. It simply is not necessary, as the landlord suggests, for a trier of fact to waive the requirement of notice and an opportunity to cure in order to resolve these cases.

In its brief, the landlord gives the example of a tenant who is causing a noise disturbance by holding band practice at 2:00 a.m. every day. Appellant's Br. 4. If the tenant continues the nightly band practice until the 30th day of the cure period, "corrects" the problem by stopping the band practice for one or two days, and then immediately resumes band practice the following day, must the landlord serve a new notice to correct or vacate before proceeding with eviction? The landlord argues that requiring a landlord to provide a new 30-day notice and opportunity to correct each time this tenant "corrects" the lease violation would allow the tenant to "continue the violation ad nauseam" without the landlord ever gaining the right to proceed with eviction. Id. 5. The Rental Housing Act could not have been intended to require "unlimited opportunities to cure" for the tenant who is a repeat violator. Id.

The plain language of the Rental Housing Act does not compel this result. Instead, the landlord may proceed on the initial notice by proving that the tenant never in fact "corrected" the violation. Under the circumstances posited, the landlord could argue quite persuasively that the tenant never "corrected" the behavior, because the tenant failed to "conform her behavior to the standard" required under the lease or to "cure" the behavior. Contrary to the landlord's suggestion, the plain language of the Rental Housing Act does not require that repeat violators receive repeat opportunities to correct their violations.

Accepting the landlord's argument that a landlord should be allowed to proceed on an old notice to correct for a renewed lease violation, by contrast, could lead to absurd or unjust results. This alternative statutory interpretation potentially is without any meaningful time limit, allowing a landlord to hold an old notice to correct over a tenant's head like a Damoclean sword. Although the landlord now argues before this Court that its interpretation will apply only "if the violation begins again within a reasonable period," no time limit was presented to the trial court below. Appellant's Br. 5 (emphasis added). Moreover, language in the Notice to Cure or Quit used by the landlord eschews any time limits. It states: "a renewal of such violation shall be cause for the landlord to seek possession of your premises without further opportunity on your part to cure such a violation." Notice To Cure Or Quit [Appellant's App. A1].

This is the same language relied on by the landlord in McGinty to argue that a recurrence of a violation a full year later did not require a new notice and opportunity to correct. As the trial court below recognized, accepting the landlord's argument suggests that a notice to correct can last "forever," leaving a tenant vulnerable to a suit for eviction for years to come. 3/16/07 Tr. at 12. Allowing such suits to go forward not only would rob the tenant of judicial repose, but also would require the tenant to proceed without one of the principal defenses available in lease

violation cases under District of Columbia law, the opportunity to correct the violation. As the trial court observed in McGinty, the implication is that once a landlord has issued a notice to correct or vacate, the tenant has one opportunity to correct followed by an indeterminate tenancy in which any single recurrence could lead to loss of the tenant's home. Denying a tenant an opportunity to correct simply because she had previously been accused of a similar violation in the past would create unjust and absurd results. This result is neither compelled by the plain language of the statute nor consistent with the purposes of the Rental Housing Act and should be rejected by this Court.

The risk that new and factually-distinct occurrences will be swept up under an old notice, without providing the tenant with a new opportunity to correct, is real. Numerous lease violation cases are filed in Superior Court every year based on broad allegations such as "noise," "disturbing other tenants," or "arguing with mangagement." It is easy to imagine a scenario in which a tenant corrects the source of the initial complaint, only to be accused of renewing the violation based on an entirely distinct problem, perhaps months or years later.

Consider a tenant who holds several parties at late hours of the night and receives a notice to correct or vacate for complaints of noise and disturbance of other tenants during the middle of the night. After receiving a 30-day notice to correct, the tenant stops holding all parties in his apartment and eliminates all noise and disturbance. Almost two years later, the tenant attends a party off the premises, returns home late at night, and causes a disturbance of his neighbors. The new incident is a single, isolated incident, factually distinct from the initial violation, and separated in time by many months.

The landlord's approach would lump this scenario into a category of cases where a new notice or opportunity to correct would be denied, because the new incident is a recurrence of a

prior violation. Because the two violations both fall under the heading of "noise" or "disturbing other tenants" during the middle of the night, the landlord facing these circumstances would be able to proceed with eviction under the old notice to correct. Such a result is absurd, unjust, and inconsistent with the plain language of the Rental Housing Act.

The fallacy of the landlord's position is that, in the name of avoiding absurd and unjust results, it would rob the trier of fact of any ability to examine the facts of an individual case and make an equitable determination. It is the rejection of a case-by-case analysis, rather than adherence to the plain language of the statute, that is likely to lead to absurd and unjust results in individual lease violation cases. The landlord's interpretation deprives the trier of fact of its central function: to evaluate the facts of a particular case and decide, given those facts, if possession is warranted. Because this interpretation conflicts with the plain language of the Rental Housing Act and risks absurd and unjust results, this Court should reject the landlord's invitation to import a broad new waiver into the statute.

II. THE TRIAL COURT PROPERLY DISMISSED THE LANDLORD'S CLAIM FOR POSSESSION BECAUSE THE LANDLORD FAILED TO COMPLY WITH THE RENTAL HOUSING ACT.

The landlord failed to meet the requirements of the Rental Housing Act in this case. The notice attached to the landlord's complaint and relied upon before the trial court is a "Notice to Quit" dated November 28, 2006. Notice To Quit [Appellant's App. A5]. This notice does not provide Ms. Nelson-Lee with an opportunity to correct the alleged lease violation. It does not specify any actions that can be taken by Ms. Nelson-Lee to avoid eviction. The notice thus fails to satisfy the plain language of the statute and its implementing regulations. See D.C. Code 42-3505.01(a) and (b); 14 D.C.M.R. 4301.2. Although the landlord also had served a prior notice to correct or vacate, see Notice To Cure Or Quit [Appellant's App. A1], only the notice to quit was attached to the complaint and relied upon by the landlord. The landlord conceded that the tenant

had corrected the violation cited in the prior notice and instead decided to proceed solely on the new notice to quit. The trial court therefore properly held that the landlord's claim for possession must be dismissed.

The facts in the instant case parallel those in McGinty, where the trial court concluded that a new notice and opportunity to correct was required by the plain language of the Rental Housing Act. In both cases, the landlord conceded that the tenant had corrected the violation during the 30-day cure period. With the landlord's concession of a correction, the original notice to correct or vacate no longer supported the landlord's claim for possession and a new notice to correct or vacate was required. In neither case did the landlord provide a new notice and opportunity to cure, mandating dismissal under the plain language of the Rental Housing Act. Because the landlord in the instant case failed to offer Ms. Nelson-Lee a new notice and opportunity to correct after conceding that she had corrected the violation cited in her prior notice, the trial court properly held that the complaint for possession must be dismissed.

This was not the only option available to a landlord in a case similar to this one. The landlord might have been able to proceed by alleging that the tenant had failed to correct the violation set forth in the initial notice and moved for eviction based on that notice. By conceding that Ms. Nelson-Lee had corrected the violation set forth in the June 2006 notice and proceeding under a new notice to quit, however, the landlord in the instant case forfeited its opportunity to make that kind of factual showing to the trier of fact. Because the landlord failed to comply with the Rental Housing Act's requirement of notice and an opportunity to correct, the trial court properly dismissed the claim for possession.

CONCLUSION

For the foregoing reasons, the order of the trial court dismissing the landlord's complaint for possession should be affirmed.

Respectfully submitted,

Beth Mellen Harrison (# 497363)
Barbara McDowell (# 414570)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Tel. (202) 628-1161

Counsel for Amicus Curiae

Dated: January 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief Amicus Curiae of The Legal Aid Society of the District of Columbia to be delivered by first-class mail, postage prepaid, the 31st day of January, 2008, to:

Phillip L. Felts
Schuman & Felts, Chtd.
4804 Moorland Lane
Bethesda, Maryland 20814

Counsel for Appellant

Carolyn Nelson-Lee
60 Hawaii Avenue, N.E., #203
Washington, D.C. 20011

Appellee

_____
Beth Mellen Harrison