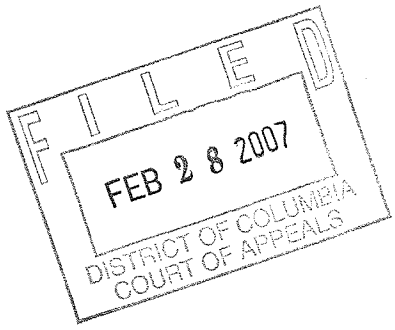
No. 06-CV-930

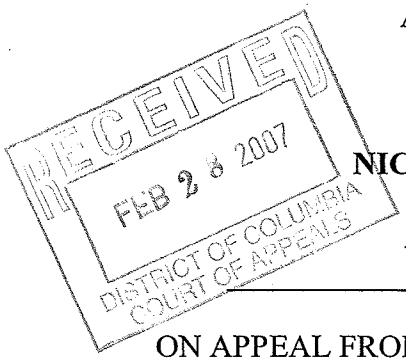
DISTRICT OF COLUMBIA COURT OF APPEALS



UHURA WILLIAMS,

Appellant

v.



NICOLE PAUL,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA,
CIVIL DIVISION, LANDLORD AND TENANT BRANCH

BRIEF OF APPELLANT

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

The parties to the case are appellant Uhura Williams, the defendant below, and appellee Nicole Paul, the plaintiff below.

In the superior court, Ms. Williams was represented by Julie Becker and Robyn Holtzman of The Legal Aid Society of the District of Columbia. She is represented in this Court by Ms. Becker and Barbara McDowell of the Legal Aid Society, and Ms. Holtzman, now of Arnold & Porter LLP.

In the superior court, the appellee was represented by William Byrd. She is represented in this Court by Mr. Byrd.

No intervenors or amici appeared in the superior court.

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the "law of the case" doctrine prevents the trial court from reversing an earlier definitive legal ruling in the case in the absence of any new facts or change in the applicable substantive law.

2. Whether, in a case where the landlord alleges nonpayment of rent and seeks rent in arrears, Landlord and Tenant Rule 5(b) permits a tenant to assert a counterclaim for a rent refund based on housing code violations, even when the tenant becomes current in her rent during the pendency of the case.

STATEMENT OF THE CASE

This appeal challenges the dismissal of a tenant's counterclaim seeking a rebate of rent paid to the landlord based on unsafe and unsanitary conditions in her home. After the landlord filed suit alleging nonpayment of rent and requesting a money judgment for the unpaid amount, the tenant asserted a counterclaim under Landlord and Tenant Rule 5(b), which provides as follows:

> (b) Counterclaims.
>
> In actions in this Branch for recovery of possession of property in which the basis of recovery is nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the defendant may assert an equitable defense of recoupment or set-off or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. No other counterclaims, whether based on personal injury or otherwise, may be filed in this Branch. This exclusion shall be without prejudice to the prosecution of such claims in other Branches of the Court.

Super. Ct. L&T R. 5(b).

The landlord moved to dismiss the counterclaim on the ground that, because the tenant had become current in rent since the case was filed, the landlord was no longer claiming

nonpayment and Rule 5(b) therefore did not apply. The presiding judge in Landlord and Tenant Court (Fisher, J.) denied the landlord's motion and permitted the counterclaim to go forward.

During trial, however, a different judge (Weisberg, J.) reversed that ruling. The trial court found that either because the complaint did not allege unpaid rent or because the landlord was no longer claiming nonpayment, the tenant could not invoke Rule 5(b). The court struck Ms. Williams's counterclaim from the case, directing her to pursue her claims, if at all, in a separate affirmative suit against the landlord.

STATEMENT OF FACTS

Appellee Nicole Paul and appellant Uhura Williams became landlord and tenant in August 2004, when Ms. Paul purchased the building located at 3536 Clay Place NE, Washington, D.C. 6/22/06 Tr. at 91. At that time, Ms. Williams resided in Apartment 3, which she had been renting from the prior owner since 2001. Id. at 51-52. Ms. Williams resided in the apartment with her four children, ranging in age from five to eleven. Id. at 163-64.

Soon after Ms. Paul assumed ownership, Ms. Williams began informing her of several serious deficiencies in the condition of her unit. These problems included mold, water leaks, cockroach infestation, exposed electrical wires, and defects in the walls, ceilings, windows, and floors. See App. 3. In October 2004, the Department of Consumer and Regulatory Affairs conducted an inspection of the apartment and ordered Ms. Paul to complete several repairs. 6/22/06 Tr. at 141-44, 168-69. Those repairs did not last, and over the next year, Ms. Williams continued to confront multiple problems in her home, including leaking water from the ceiling and a lack of heat in the winter. Id. at 153.

Despite these deficiencies, Ms. Williams continued to pay her rent of $550 per month to the landlord. Id. at 30, 77. Over time, however, a growing dispute developed regarding the

timing and receipt of those rent payments. Ultimately, on November 7, 2005, Ms. Paul served Ms. Williams with a 30-day notice to correct or vacate the premises, alleging as follows:

> Your violation consists of the following: Consistent late payments,
> Non payment of rent for months October & November = $1020 total
> (October rent $550 - $150 rent discount = $400 plus $35 late fee
> November rent $550 plus $35 late fee total $1020).
> Landlord seeks possession of unit.

App. 1.[1] Ms. Williams declined, to vacate, and on February 22, 2006, Ms. Paul filed suit in Landlord-Tenant court. App. 2.

Ms. Williams's motion to dismiss the complaint. The complaint in Landlord-Tenant Court indicated that Ms. Paul was seeking possession for "Violations of Notice to Cure or Vacate: Consistently late rent; Overoccupancy; Subletting." Id. It also stated that "the landlord asks the court for . . . judgment for rent, late fees, other fees, and costs in the amount of $550.00." Id. The Complaint attached the November 7, 2005, notice to correct or vacate ("November 7 notice"). Id.

Ms. Williams filed a motion to dismiss the landlord's complaint, claiming insufficiencies in the complaint and notice to quit. On May 9, 2006, the court (Canan, J.) struck the claims of "overoccupancy" and "subletting" as not included in the November 7 notice, but sustained the remainder of the case. 5/9/06 Tr. at 6-9, 15. At the conclusion of the motions hearing, counsel for Ms. Williams clarified the claims at issue:

> MS. HOLTZMAN: Your honor, just so I'm clear. So the overoccupancy [and] subletting allegations were stricken by your prior order?
>
> THE COURT: Correct.
>
> MR. BERG [sic]:[2] Yes.

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[1] At trial, Ms. Williams testified that the "$150 rent discount" was an abatement for a problem with her floor, agreed upon informally by the parties. 6/22/06 Tr. at 79.

[2] William Byrd, Counsel for Nicole Paul.

MS. HOLTZMAN: And the remaining ones are the non-payment of rent and consistent late payments?

THE COURT: Correct.

5/9/06 Tr. at 15-16. Counsel for the landlord voiced no objection to that characterization of the case, and the parties proceeded with discovery and trial preparation. Id.

Ms. Williams's counterclaim. On May 12, 2006, after the court denied her motion to dismiss the case, Ms. Williams filed an answer and counterclaim. App. 3. Ms. Williams sought to recoup rent she had paid since Ms. Paul assumed ownership, based on persistent and serious housing code violations in her home. Id.

Trial was originally scheduled for May 26, 2006. On that date, both parties filed motions: the landlord moved to dismiss Ms. Williams's counterclaim, while Ms. Williams filed a motion to continue the trial and to show cause why the Department of Consumer and Regulatory Affairs should not be held in contempt for failing to respond to Ms. Williams's subpoena for documents and a witness regarding housing code violations at the premises. App. 4. In her motion, Ms. Williams argued that the subpoenaed evidence was essential because she had raised defenses of housing code violations and retaliation, and because she "has counterclaimed for relief based on the breach of the implied warranty of habitability." Id. at 4.

The court (Broderick, J.) granted Ms. Williams's motion for an order to show cause, ordered the government to produce the required evidence and witness, and continued the trial until June 22, 2006. It refused to hear the landlord's motion to dismiss, ordering the parties back at a later date so that Ms. Williams would have a chance to respond to the motion. App. 7 (Docket entries, 5/26/06).

The landlord's motion to dismiss the counterclaim. The motion to dismiss alleged a number of grounds, primarily that "the Counter-Complaint seeks to apply as an end around

method to defend a breech [sic] of lease claim on alleged housing code violations when such a defense is not recognized by this court." App. 5, at ¶ 4. Ms. Williams opposed the motion, arguing that the counterclaim was proper under Landlord and Tenant Rule 5(b). Ms. Williams pointed out that the November 7 notice, on which the complaint was based, alleged nonpayment of rent for October and November 2005; she also noted that the complaint sought a judgment for rent in the amount of $550. App. 6, at 1. She argued that because the landlord had claimed nonpayment and sought a judgment for unpaid rent, she was entitled under Rule 5(b) to raise counterclaims "for a money judgment based on the payment of rent." Id. at 5 (quoting Super. Ct. L&T R. 5(b)).

The court (Fisher, J.) heard argument on the motion on June 8, 2006. During the hearing, counsel for the landlord claimed that the case was based only on consistent late payment, not on nonpayment of rent. 6/8/06 Tr. at 8. In response to the tenant's argument that both the notice and the complaint alleged unpaid rent, counsel for the landlord stated that by the time of the initial return date in the case, Ms. Williams had become current in her rent payments. Id. at 9.

The court did not find that concession dispositive on the question of whether the case contained a claim for nonpayment of rent. It ruled: "Based upon the information that I have before me, at least this case is in whole, if not in part, a motion for possession based upon nonpayment of rent, and I would deny the motion to dismiss the counterclaim." Id.

The trial on the merits and the dismissal of the counterclaim. The case proceeded to a bench trial before Judge Frederick Weisberg on June 22, 2006. At the outset, the landlord's counsel renewed his objections to the counterclaim, arguing – as he had argued at the hearing before Judge Fisher – that the landlord was not pursuing a nonpayment claim because Ms. Williams had "brought herself current." 6/22/06 Tr. at 9. Counsel for the tenant explained Judge

Fisher's decision that, because Ms. Paul had made a claim for nonpayment in the complaint, the counterclaim was properly at issue. Id. at 10. Ms. Williams's counsel also noted that "all these issues were aired and decided upon previously" by Judge Fisher. Id.

The trial court recognized that the earlier decision controlled, stating that "I'm not going to redo a ruling that Judge Fisher's already made." Id. at 11. The court observed: "I am not sure what I would have ruled, but I think it is probably law of the case. It's a dispositive ruling on a point that was fully briefed and argued. . . . And I'm not going to change the ruling just because you got another chance to argue the same point that you already argued and lost before a different judge." Id. at 13-14.

The trial proceeded on the landlord's claim of consistent late payment of rent. At the close of the plaintiff's case in chief, the court – finding that Ms. Williams had, indeed, become current in rent two days after the complaint was filed – sua sponte revisited the question of whether she was entitled to pursue her counterclaim. Id. at 110. The court stated that "[n]otwithstanding Judge Fisher's ruling to the contrary," it "did not see" why the counterclaim could be at issue in the case, given that there was no dispute as to whether Ms. Williams owed rent. Id. The court heard argument once again from Ms. Williams's counsel, who argued both that the counterclaim was authorized by Landlord and Tenant Rule 5(b) and that Judge Fisher's earlier ruling was controlling. Id. at 111-123.

The court found neither argument persuasive. The trial court put forth two bases for striking Ms. Williams's counterclaim: first, it denied that the pleadings contained a nonpayment claim at all, asserting that the November 7 notice was wholly separate from the complaint and that the complaint, on its face, did not allege nonpayment. 6/22/06 Tr. at 114. Accordingly, because the landlord had not checked the "nonpayment of rent" box on the complaint, the

pleading "was not sufficient to state a claim for nonpayment" and therefore did not satisfy the prerequisites of Rule 5(b). 6/23/06 Tr. at 58.

On the other hand, the court did acknowledge that the complaint referenced the November 7 notice, and that the notice alleged nonpayment of rent for two months. 6/22/06 Tr. at 121. The court also acknowledged that the complaint included a request for a judgment of $550 in rent. Id. at 118-19. Thus, as an alternative to finding that the case contained no nonpayment claim, the court held that the counterclaim should be dismissed because Ms. Williams had cured the nonpayment shortly after the case was filed. Id. at 121-23; see 6/23/06 Tr. at 58 ("[I]n any event, the tenant had indisputably cured that violation by paying . . . . So for all of those reasons, I think it was unreasonable to construe this complaint as a complaint for possession based on nonpayment of rent."). The court therefore concluded: "[W]ithout prejudice to [Ms. Williams's] right to assert her counterclaim, wherever she chooses to assert it as an affirmative claim, I'm not going to permit it as a counterclaim to this complaint. And if it reverses a ruling that you relied on, so be it." Id. at 123.

The court went on to find in Ms. Williams's favor on the consistent late payment issue. Ruling that forfeiture of the lease was unwarranted in light of all the circumstances, the court noted that Ms. Williams was "one of the more responsible tenants I've seen in all the time I've worked in the landlord and tenant court," and found her testimony credible "in virtually all respects." 6/23/06 Tr. at 60. It denied the landlord's claim for possession and entered judgment in favor of Ms. Williams. Id. at 75.

This appeal, solely on the dismissal of Ms. Williams's counterclaim, followed.

SUMMARY OF THE ARGUMENT

This case is about the scope of a tenant's right, under Landlord and Tenant Rule 5(b), to respond to a landlord's claim for nonpayment of rent with a counterclaim asserting housing code violations at the premises. The trial court below, reversing an earlier ruling in the case on the same legal issue, found that Rule 5(b) did not authorize Ms. Williams's counterclaim because she had paid her outstanding rent while the case was pending. Under both law-of-the-case principles and Rule 5(b) itself, that ruling was incorrect.[3]

First, the dismissal of Ms. Williams's counterclaim violated the law-of-the-case doctrine, which prevents a court from reversing a dispositive legal ruing made earlier in the case in the absence of new relevant facts or controlling law. The trial court here relied on neither. To the contrary, the facts upon which it relied to dismiss Ms. Williams's counterclaim were identical to those before the motions judge when he denied the landlord's motion to dismiss the claim. Nor had there been any intervening change in the law that justified reversing the earlier decision.

Second, the trial court misapprehended the scope of its authority under Landlord and Tenant Rule 5(b). The rule authorizes a tenant to assert a counterclaim for a rent refund wherever the landlord's complaint alleges that "the basis of recovery is nonpayment of rent" or "join[s] a claim for recovery of rent in arrears." Super. Ct. L&T R. 5(b). In this case, the complaint claimed that Ms. Williams had not paid her rent and sought a judgment for the unpaid amount. The complaint thus satisfied both of the alternative prerequisites for a rent refund counterclaim set forth in Rule 5(b), entitling Ms. Williams to pursue her counterclaim at trial.

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[3] The trial court's interpretation of Rule 5(b) is subject to de novo review. See, e.g., In re Estate of Grealis, 902 A.2d 821, 824 n.5 (D.C. 2006) (appellate court reviews interpretation of a court rule de novo); Ferguson v. United States, 866 A.2d 54, 59 (D.C. 2005) (same).

Although it has not stated as much explicitly, this Court also applies de novo review to law-of-the-case questions. See Kritsidimas v. Sheskin, 411 A.2d 370, 371 (D.C. 1980); P.P.P. Productions, Inc., v. W&L, Inc., 418 A.2d 151, 152 (D.C. 1980).

The trial court's conclusion – that Rule 5(b) did not apply because the "nonpayment box" on the complaint was not checked, or because Ms. Williams had become current in her rent during the pendency of the case – has no support in either the language or the purpose of the rule. The complaint attached and referred to the November 7 notice, which plainly alleged nonpayment of rent; in addition, the complaint on its face sought judgment for one month of unpaid rent. See App. 2. Nor did Ms. Williams's payment of rent after the case commenced affect the validity of her counterclaim. Rule 5(b) applies wherever the complaint seeks possession or a money judgment based on nonpayment of rent; nothing in the rule requires the landlord to continue to press her rent claim in order for the court to retain jurisdiction over the tenant's properly asserted counterclaim.

Furthermore, the two purposes of Rule 5(b), "judicial economy and fundamental fairness," are served equally in a case like this one, where the landlord's rent claim drops out before trial, as in a case where both parties' rent claims move forward to trial. It would have been far more efficient for both the parties and the judicial system to resolve this landlord-tenant dispute in one trial rather than two, particularly because the second suit would involve largely duplicative testimony and evidence. Resolving the counterclaim also would have been fundamentally fair to both parties. It would have been fair for Ms. Williams, whose good-faith attempt to become current in rent cost her the opportunity to recover in this case for the unsafe and unsanitary conditions of her home. It also would have been fair to the landlord, who would have to defend against Ms. Williams's claim at some point in any event, and who presumably was prepared to do so in the trial here.

ARGUMENT

I. THE RULING DENYING THE MOTION TO DISMISS MS. WILLIAMS'S COUNTERCLAIM WAS "LAW OF THE CASE" AND SHOULD HAVE BOUND THE TRIAL COURT.

The court erred in dismissing Ms. Williams's counterclaim mid-trial. The question of Ms. Williams's ability to pursue that claim had been thoroughly briefed, argued, and ruled upon earlier in the case. That ruling – a final disposition on the issue – was the law of the case. The trial court had no basis for disregarding it.

The "law of the case" rule is well-settled in this jurisdiction. "The law of the case doctrine prevents relitigation of the same issue in the same case by courts of coordinate jurisdiction. . . . It facilitates the disposition of cases by preventing judge-shopping and repeated attempts by a party to obtain a favorable ruling on the same issue." Johnson v. Fairfax Village Condominium IV Unit Owners Ass'n, 641 A.2d 495, 503 (D.C. 1994); see Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 677 A.2d 46, 48 (D.C. 1996) ("'[O]nce the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court.'") (quoting Kritsidimas v. Sheskin, 411 A.2d 370, 371 (D.C. 1980)).[4]

There are two exceptions to the law-of-the-case doctrine. First, law of the case may not apply where the initial ruling "has little or no 'finality' to it." Kritsidimas, 411 A.2d at 372. Second, a court is not bound by law of the case where "the first ruling is clearly erroneous in

[4] This Court has repeatedly affirmed the law-of-the-case rule. See, e.g., Puckrein v. Jenkins, 884 A.2d 46, 55 (D.C. 2005); Pannell v. District of Columbia, 829 A.2d 474, 477-78 (D.C. 2003); In re Baby Boy C., 630 A.2d 670, 678 (D.C. 1993); Weinberg v. Johnson, 518 A.2d 985, 987 (D.C. 1986); Kaplan v. Pointer, 501 A.2d 1269, 1270-72 (D.C. 1985).

light of newly-presented facts or a change in substantive law." Id.; see Lenkin, 677 A.2d at 49 (same). Neither exception applies here.[5]

A. Judge Fisher's order was a definitive ruling.

As to the finality question, this Court has held repeatedly that the denial of a motion to dismiss is sufficiently "final" to constitute law of the case. See, e.g., Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1197 (D.C. 1984) (denial of motion to dismiss based on statute of limitations); P.P.P. Productions, Inc., v. W&L, Inc., 418 A.2d 151, 152 (D.C. 1980) (denial of motion to dismiss based on res judicata); Kritsidimas, 411 A.2d at 373 (denial of motion to dismiss for failure to prosecute).

In this case, the denial of the landlord's motion to dismiss Ms. Williams's counterclaim was a definitive ruling on her ability to pursue that claim in the landlord-tenant action. Indeed, the trial court recognized as much at the outset of trial, noting that the earlier decision was "a dispositive ruling on a point that was fully briefed and argued." 6/22/06 Tr. at 13. The court later reversed itself – but it offered no basis for altering this conclusion. Nor did it explain why Judge Fisher's earlier ruling was no longer "final" for law-of-the-case purposes.

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[5] The U.S. Supreme Court has applied a similar standard, holding that the law of the case doctrine precludes a court from revisiting a point earlier decided "in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) (citations and internal quotation marks omitted). No such "extraordinary circumstances" exist in this case. For the reasons explained below, the court's refusal to dismiss Ms. Williams's counterclaims not only was not "clearly erroneous," but was fully consistent with the mandate of Landlord and Tenant Rule 5(b). See Part II, infra. Nor would it have worked a "manifest injustice" to the landlord to allow Ms. Williams to litigate her claims in this case. The parties, following Judge Fisher's ruling, had proceeded to trial with the understanding that the counterclaim would be litigated, giving the landlord ample time to prepare her defense. More importantly, because Ms. Williams could have filed the same claim as a separate suit in the civil division, the landlord would have been required to litigate the claim at some point, presumably at greater cost to her as well as to the tenant.

B. There were no additional facts or law justifying reversal of the earlier decision.

Where the court has denied a motion to dismiss, the law of the case controls any subsequent motion presenting "substantially similar" facts and legal arguments. Duggan v. Keto, 554 A.2d 1126, 1132 n.6 (D.C. 1989) (finding law of the case inapplicable because the judge "had additional evidence before her, obtained through discovery"). Here, the facts before Judge Weisberg at trial were not merely "substantially similar," but identical to those presented to Judge Fisher in the motion to dismiss. At the hearing on the landlord's motion, counsel for the landlord stated that Ms. Williams was current in rent; that she had been current on the initial return date; and therefore that the case contained no claim for nonpayment of rent. 6/8/06 Tr. at 9. Counsel reiterated this position to Judge Weisberg at the outset of the trial. 6/22/06 Tr. at 13.[6] At that point, the trial court properly denied relief, recognizing that it was bound by Judge Fisher's ruling permitting the counterclaim to go forward. See id.

When the court reversed itself, later that same day, it relied not on new evidence presented at trial, but on the same facts that were at issue before Judge Fisher on the motion to dismiss. The court indicated that the testimony presented in the landlord's case made clear that no nonpayment claim was at issue. Id. at 110. But the facts established by the landlord's witnesses, and relied upon by the court, were identical to those presented earlier in the case: that Ms. Williams became current two days after the complaint was filed, and that by the time of the initial return date, she owed no rent. Id. The evidence at trial added nothing to these facts. Cf.

[6] Indeed, even counsel for the landlord acknowledged that he was re-arguing the same point that Judge Fisher had rejected. 6/22/06 Tr. at 13 ("It is an issue that was argued, and over our objections, the counter-complaint was allowed to go forward. But I believe because the judge was told that morning, again – again told that morning that the rent issue had been resolved earlier in the case, that that Rule 5 really should have covered this.").

Duggan, 554 A.2d at 1132 n.6 (noting that denial of a motion to dismiss should not be reconsidered unless the movant presents "new pertinent facts").

The landlord also did not claim, and the trial court did not hold, that there had been any change in the relevant law since Judge Fisher's decision permitting the counterclaims to go forward. To the contrary, the legal points raised during trial were essentially identical to those briefed and argued at the motion to dismiss stage. See id. at 111-123; 6/8/06 Tr. at 7-9; App. 5 (Plaintiff's Objections and Motions to Dismiss Defendant's Counter-Claim); App. 6 (Defendant's Opposition).

"'Except in a truly unique situation, no benefit flows from having one trial judge entertain what is essentially a repetitious motion and take action which has as its purpose the overruling of prior action by another trial judge.'" P.P.P. Productions, 418 A.2d at 152 (quoting United States v. Davis, 330 A.2d 751, 755 (D.C. 1975)). This case presented no such "truly unique" circumstances. To the contrary, the landlord's relitigation of the same motion to dismiss, with different results, amounts to precisely the sort of "judge-shopping" that the law-of-the-case doctrine is designed to avoid. Johnson, 641 A.2d at 503; see Tompkins v. Washington Hosp. Ctr., 433 A.2d 1093, 1098 (D.C. 1981) (noting that the law-of-the-case doctrine "serves the judicial system's need to dispose of cases efficiently by discouraging 'judge-shopping' and multiple attempts to prevail on a single question"). The danger of judge-shopping is especially acute in Landlord-Tenant Court, where a different judge presides every week and multiple judges may be involved at various points in a given case. In those circumstances, the law-of-the-case rule is particularly important in ensuring that legal rulings remain consistent as the case moves through the judicial system.

Finally, although the court's ruling did not preclude Ms. Williams from pursuing her claims in another forum, it did result in a significant waste of resources in this case. Had Judge Fisher initially denied Ms. Williams's counterclaim, she could have filed her civil action for overpaid rent and consolidated the two actions in time for trial. See Super. Ct. Civ. R. 42(a) (providing for consolidation where two cases present a "common question of law or fact"). But, in reasonable reliance on Judge Fisher's ruling, Ms. Williams instead fully prepared for trial on her counterclaim in this action. She subpoenaed witnesses, organized exhibits, and planned testimony regarding the conditions of her home. 6/22/06 Tr. at 19. The landlord, having lost the motion to dismiss, presumably also prepared to defend against Ms. Williams's claim. That effort by both parties went to waste when the court reversed the earlier ruling and dismissed the counterclaim on the day of trial. In addition, the timing of the court's decision – when it was too late for Ms. Williams to try to consolidate separate claims into this case – meant that any trial on her claim for overpaid rent could not possibly take place in this action, but instead would be months or years away.

The trial court was not free to disregard Judge Fisher's earlier ruling denying the landlord's motion to dismiss. The issue had been fully briefed and argued, to a final ruling, before an earlier landlord-tenant judge. Absent a change in facts or law – neither of which existed here – the court erred in denying Ms. Williams the chance to prove her counterclaim in this case.

II. MS. WILLIAMS'S COUNTERCLAIM WAS PROPERLY BEFORE THE COURT UNDER LANDLORD AND TENANT RULE 5(b).

Even absent the law-of-the-case error, the decision below still would warrant reversal on the substantive issue: the trial court's conclusion that it lacked jurisdiction to hear Ms.

Williams's counterclaim. The complaint for possession in this case, together with the incorporated notice to correct or vacate, cited nonpayment of rent as a "basis for recovery" and "joined a claim for recovery of rent in arrears." App. 2; Super. Ct. L&T R. 5(b). Having been sued for nonpayment of rent and for a judgment of rent in arrears, Ms. Williams was entitled, under Landlord and Tenant Rule 5(b), to assert "a counterclaim for a money judgment based on the payment of rent." Super. Ct. L&T R. 5(b). The landlord's subsequent concession that Ms. Williams owed no rent did not change the nature of the initial claim, nor did it deprive the court of the power to hear Ms. Williams's properly asserted counterclaim.

A. Rule 5(b) authorizes a counterclaim where, as here, the landlord alleges nonpayment of rent or seeks to recover unpaid rent from the tenant.

1. On its face, the complaint satisfies the requirements for invoking Rule 5(b).

"In order to interpret Super. Ct. L&T R. 5(b), we look first at the language of the rule." Hines v. John B. Sharkey Co., 449 A.2d 1092, 1093 (D.C. 1982). That language provides as follows:

> (b) Counterclaims.
>
> In actions in this Branch for recovery of possession of property in which the basis of recovery is nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the defendant may assert an equitable defense of recoupment or set-off or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. No other counterclaims, whether based on personal injury or otherwise, may be filed in this Branch. This exclusion shall be without prejudice to the prosecution of such claims in other Branches of the Court.

Super. Ct. L&T R. 5(b). The rule thus permits a counterclaim for overpaid rent, or for injunctive relief related to the premises, in two circumstances: 1) where the landlord's claim for possession is based on an allegation that the tenant has failed to pay rent; and/or 2) where the landlord seeks

a monetary judgment for unpaid rent, even if the possessory claim is "based on other defaults." Griffith v. Butler, 571 A.2d 1161, 1164 n. 4 (D.C. 1990).

The complaint against Ms. Williams presented both of the alternative bases for asserting a counterclaim under Rule 5(b). First, the landlord filed this action claiming, as a partial "basis for recovery," that Ms. Williams had failed to pay rent for the premises. The November 7 Notice, attached to and incorporated by the complaint in this case, stated as much plainly: "Non payment of rent for months October & November = $1020 total; (October rent $550 - $150 rent discount = $400 plus $35 late fee; November rent $550 plus $35 late fee total $1020)." App. 1.[7] The only plausible understanding of the notice, and the complaint to which it was attached, was that the landlord was seeking possession based in part on the tenant's alleged nonpayment.

Second, the complaint, on its face, requests "judgment for rent, late fees, other fees, and costs in the amount of $550.00," or one month's rent. App. 2 (emphasis added). This request is indisputably a "claim for recovery of rent in arrears" as contemplated by Rule 5(b). Thus, by its plain language, the landlord's complaint claimed that Ms. Williams had not paid rent, and sought both possession on that ground and a judgment for the arrearage.

The trial court concluded otherwise, asserting that the complaint did not allege nonpayment of rent and therefore that Rule 5(b) did not apply. See 6/22/06 Tr. at 114; 6/23/06 Tr. at 58. That conclusion was incorrect. As noted above, the complaint attached and incorporated the November 7 notice, which claimed nonpayment of rent and sought possession of the premises on that basis. App. 1. Additionally, as the trial court acknowledged, the

[7] "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Super. Ct. R. Civ. Pro. 10(c) (incorporated into the Landlord and Tenant Branch by Super. Ct. L&T R. 2).

complaint itself sought a judgment for rent in arrears. 6/22/06 Tr. at 118-19. The complaint therefore satisfied both of the alternative prerequisites set forth in Rule 5(b).

2. The landlord's relinquishment of her nonpayment claim did not deprive the court of authority to hear Ms. Williams's counterclaim.

That Ms. Williams decided to pay her rent while this case was pending does not alter the court's power to resolve her counterclaim. By filing a complaint that placed rent at issue in the case, the landlord provided the necessary predicate under Rule 5(b) for the tenant to file a counterclaim for overpaid rent based on housing code violations. Nothing in Rule 5(b) requires the landlord's rent claim to remain at issue throughout the case in order for the tenant to maintain her counterdemand.

In dismissing Ms. Williams's claims, the trial court appeared to find dispositive that she had become current in rent by the initial return date, and therefore that the nonpayment allegation was "an untrue complaint." 6/22/06 Tr. at 117. It concluded that because Ms. Williams could have obtained summary judgment on that issue, based on the undisputed fact that she had cured the nonpayment, there was no jurisdiction for her to assert counterclaims. Id. at 121-22.

The trial court's conclusion has no basis either in the language of Rule 5(b) or in any other principle of civil litigation. Rule 5(b) permits counterclaims wherever the complaint asserts nonpayment as a basis for recovery or joins a claim for rent in arrears. It does not limit its scope to cases in which the nonpayment claim is meritorious. Nor does the rule require that the nonpayment allegation survive to trial in order for the tenant to litigate her own claim. There is no basis for reading such a limitation into the unambiguous language of the Rule 5(b). See generally Hines, 449 A.2d at 1093 ("We decline to imply a time limitation on a tenant's counterclaim [thereby confining the claim to the time period alleged in the landlord's complaint] when it would be contrary to the plain language of the rule.").

Rule 5(b) also must be read consistently with Civil Rule 41(a)(2), which is incorporated into landlord-tenant proceedings by Landlord and Tenant Rule 2. Rule 41(a)(2) specifically mandates that dismissal of a plaintiff's main cause of action has no effect on the defendant's right to pursue a counterclaim: "If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court." Super. Ct. Civ. R. 41(a)(2). Along similar lines, this Court has repeatedly noted that a defendant's counterclaim may go forward even if the plaintiff's claim is resolved or dismissed before trial. See, e.g., Fischer v. Estate of Flax, 816 A.2d 1, 3 (D.C. 2003); Gill v. Howard Univ., 801 A.2d 949, 949 (D.C. 2002); Metropolitan Baptist Church, Inc. v. Minkoff, 462 A.2d 460, 460 (D.C. 1983). Cf. Super Ct. R. Civ. Pro. 54(b) (setting forth general rule that a court's ruling as to one claim or set of claims is not a final order until all counterclaims and cross-claims are resolved).

Consistent with the plain terms of Rule 5(b) and Civil Rule 41(a)(2), it is common for a trial court to hear a tenant's counterclaim where the landlord's claim has already been resolved. In Anderson v. Abidoye, for example, the trial court dismissed the landlord's claims for rent and possession early in the case, but proceeded to hear evidence and award a rent refund on the tenant's counterclaim. See 824 A.2d 42, 43 (D.C. 2003), appeal after remand pending, No. 05-CV-275. This Court agreed that the tenant was entitled to recover in that case, remanding only on the issue of whether the tenant could also obtain the portion of her rent paid by the federal government under her housing subsidy program. See id. at 44. Similarly, in Mathis v. Barrett, this Court noted that a tenant's counterclaim relating to housing code violations "arguably falls within the ambit of Rule 5(b)," even though the landlord's claim had been dismissed for failure

to serve a notice to quit. See 544 A.2d 287, 288. But, because those portions of the counterclaim could not be severed from tort claims that fell outside Rule 5(b), the Court affirmed the dismissal without prejudice. See id. at 289.

As Rule 41(a)(2) makes clear, a landlord may not avoid a tenant's counterclaim merely by dismissing her claim for rent in arrears; once the landlord has filed suit on this basis, Rule 41(a)(2) permits the tenant to pursue her rent refund counterclaim to its conclusion. Here, moreover, the landlord never even amended her complaint to remove the claim for possession based on nonpayment, or to dismiss the request for rent in arrears. Absent an amendment to the complaint – which Ms. Paul would have been freely entitled to make under Super. Ct. Civ. R. 15(a) – the claim before both Ms. Williams and the court was that Ms. Williams owed rent to her landlord. That this charge was ultimately proven to be without merit does not eliminate it as an asserted basis for recovery in the case. And, having asserted that claim, the landlord also subjected herself to the counterclaim authority of Rule 5(b).[8]

Finally, to the extent that the trial court believed that it could not adjudicate the counterclaim for lack of jurisdiction, that conclusion was in error. See 6/22/06 Tr. at 121-22. "[O]nce a suit is filed in a court of general trial jurisdiction, like the Superior Court, the mere fact that it 'is separated into a number of divisions, do[es] not delimit their power as tribunals of the

[8] That the landlord indisputably intended to sue for rent in this action distinguishes this case from Killingham v. Wilshire Investments Corporation, in which this Court affirmed the dismissal of a tenant's counterclaims once the landlord amended its complaint to remove an erroneous claim for rent. See 739 A.2d 804, 806 (D.C. 1999). Because the complaint in Killingham "mistakenly included rent" for a unit that the tenant no longer occupied, the trial court permitted the landlord to amend it to reflect only "the correct time and the correct amount of rent" due for the tenant's current premises. See id. Once the landlord corrected its error, the trial court, affirmed by this Court, found that Rule 5(b) no longer permitted the tenant to raise counterclaims relating to that prior, mistakenly included apartment. See id. at 808. Here, by contrast, there can be no dispute that the landlord, in an effort to collect back rent and to evict Ms. Williams for her failure to pay it, purposely included a rent claim in both her notice to quit and her complaint for possession. Nor did she amend her complaint at any point to remove those claims.

Superior Court . . . to adjudicate civil claims and disputes.'" Millman, Broder & Curtis v. Antonelli, 489 A.2d 481, 483 (D.C. 1985) (quoting Andrade v. Jackson, 401 A.2d 990, 993 (D.C. 1979)). In Millman, this Court held that the Landlord-Tenant Court retains authority to hear a landlord's claim for back rent even after the possessory case becomes moot by the tenant's move from the premises. In affirming the Landlord-Tenant Court's power to adjudicate the remaining rent dispute, the Court noted that a judge sitting in the Landlord and Tenant Branch retains all the powers inherent in the Civil Division, and that a tenant does not deprive the court of authority over the rent claim merely by deciding to vacate the unit. See id.

Similarly here, a landlord cannot deprive the court of authority to hear a counterclaim regarding housing code violations, which is otherwise authorized under Rule 5(b), merely by ceasing to press the claim for unpaid rent. Such a rule would allow a plaintiff, by withdrawing the claim for relief, arbitrarily to deprive a defendant of her cause of action, at least for purposes of the pending case. Cf. Millman, 489 A.2d at 483 (finding that the landlord's rent claim could not "be defeated by the voluntary act of a defendant which satisfies only a portion of the relief sought by the plaintiff").

B. The goals of Rule 5(b) weigh in favor of resolving this landlord-tenant dispute in one case rather than two.

In dismissing Ms. Williams's counterclaim, the trial court proceeded on the premise that it did not have authority to entertain the claim, not that it had discretion to decide whether or not doing so would comport with the summary nature of landlord-tenant proceedings. As discussed above, that conclusion was erroneous. But even if Rule 5(b) gave a trial court discretion to depart from Civil Rule 41(a)(2) and decline to entertain such counterclaims, and even if the trial court purported to exercise that discretion here, the court would have had no basis for dismissing the counterclaim in this case.

1. Rule 5(b) balances important interests in landlord-tenant proceedings.

The decision to authorize counterclaims for overpaid rent in Landlord and Tenant Court serves concerns of "judicial economy and fundamental fairness." Hines, 449 A.2d at 1094 (quoting Minutes of the Landlord-Tenant Subcommittee of the Advisory Committee on Superior Court Rules of Civil Procedure, meeting of March 23, 1972). Rule 5(b) permits two limited types of counterclaim, for rent and for equitable relief related to the premises, that are closely related to the landlord's allegation of unpaid rent. In this way, Rule 5(b) helps "to secure the just, speedy, and inexpensive determination of every action" by authorizing the resolution of all disputes related to the payment of rent in one case, and by permitting the tenant as well as the landlord to bring her rent-related claims before the court. Super. Ct. L&T R. 1.

Regarding judicial economy, Rule 5(b) incorporates the principle that it is almost always more efficient – for the parties, the witnesses, and the judicial system – to have one trial rather than two involving the same basic controversy. In the landlord-tenant context, the rule permits the court to hold one trial about the condition of the premises and the amount of rent due, rather than one in Landlord and Tenant Court and one in a separate proceeding if the tenant chooses to bring an affirmative claim. See Hines, 449 A.2d at 1094 (noting that hearing counterclaims avoids "inevitable litigation over complex questions of issue preclusion, as well as duplication of testimony"). In this way, landlord-tenant litigants and judges, like those in other civil courts, can avoid duplication of effort and serial lawsuits involving the same parties and the same subject matter. See id.; Griffith v. Butler, 571 A.2d 1161, 1164-65 (D.C. 1990) (noting that Rule 5(b) authorizes counterclaims based on the payment of rent and arising out of the same transaction as the landlord's claim for possession); see also District of Columbia v. Morris, 367 A.2d 571, 574 (D.C. 1976) (noting that the purpose of Civil Rule 13(a), governing counterclaims, "is 'to

prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters'") (quoting Southern Construction Co. v. Pickard, 371 U.S. 57, 60 (1962)).

As to "fundamental fairness," Rule 5(b) recognizes that a landlord who chooses to put rent in issue can reasonably be expected to answer the tenant's counterclaims regarding the same subject – rent – and the same premises. See Hines, 449 A.2d at 1094. The rule applies only where the landlord has already haled the tenant into court on an allegation that she has defaulted on her financial obligations, forcing the tenant to defend against what is, in effect, a claim of delinquency. It is only fair, under those circumstances, to permit the tenant to prove not only that she has paid the landlord, but that she has in fact overpaid. Indeed, the Landlord and Tenant Rules are reciprocal in this way; a landlord is subject to a counterclaim only if it makes a demand for rent, whereas a tenant is subject to a money judgment, absent personal service, only if she places money at issue by asserting a counterclaim, recoupment or setoff. See Super. Ct. L&T R. 3. The rules thus strike a balance between the parties' monetary claims; if one invokes a claim for rent, the other is entitled to recover as well.

Like the availability of housing code and other defenses and the right to a jury trial, Rule 5(b) alters, to a limited extent, the summary character of landlord-tenant proceedings. See generally Bell v. Tsintolas Realty Co., 430 F.2d 474, 481 (D.C. Cir. 1970) (noting that the development of tenant protections has "altered the summary nature" of possessory actions). As this court has recognized, however, at least in cases where the landlord has alleged unpaid rent, the concerns of judicial economy and fairness weigh in favor of resolving the tenant's claims, even at the partial expense of summary process. See Hines, 449 A.2d at 1094 ("We agree that the summary nature of the proceeding is altered when tenants plead counterclaims . . . . Other

mechanisms, however, such as [the protective order], are the best means of protecting the landlords' interests."). This is so because the limited counterclaims authorized in Rule 5(b) – for rent and equitable relief regarding the premises – are so closely related to the landlord's rent claim that it does not make sense to require a separate, affirmative civil action to resolve them.

2. The purposes of Rule 5(b) are served no less where the landlord has ceased to press its nonpayment claim than where both the landlord's and the tenant's rent claims survive to trial.

Here, while hearing Ms. Williams's counterclaim might have lengthened the trial in this matter by an hour or two, it nonetheless would have been a more speedy, economical, and inexpensive resolution – for both parties and for the judicial system – than forcing her to commence a new civil lawsuit against the landlord. Such a solution also would have been more "just" to Ms. Williams, whose good-faith decision to pay her rent cost her the opportunity to pursue her counterclaim in this case. Nor would it have been unjust to the landlord, who would be required to defend against the claim in another forum in any event.

a. Striking Ms. Williams's counterclaim was inefficient for Ms. Williams, for the landlord, and for the judicial system. By dismissing her claim – without prejudice to her right to assert it affirmatively – the trial court left Ms. Williams with no option other than to file a new civil lawsuit against the landlord, embroiling the parties in additional, largely duplicative litigation. As a result, the court system will have to hear two trials instead of one, with overlapping testimony about the landlord-tenant relationship and the payment of rent. A second judge will have to familiarize himself or herself with the facts, evaluate much of the same evidence, and make many of the same credibility determinations already made by the trial court here. The parties will both have to prepare again for trial, and any recovery that Ms. Williams ultimately wins will be several months or years away.

Moreover, that new action inevitably will duplicate the inquiry made in this case regarding housing code violations. Because Ms. Williams raised a retaliation defense to the lease violation charge, the trial court was required to evaluate whether she had made complaints about housing conditions and whether those complaints and repair needs, not her alleged consistent late payment, were the real reason for the landlord's action to evict her. See 6/23/06 Tr. at 72 (addressing whether the breach-of-lease claim was "pretextual"). An affirmative suit about the value of those housing code violations would rely on much of the same evidence; it would also require duplicative testimony from at least one of Ms. Williams's witnesses, Housing Inspector Debra Colbert, who appeared at trial in connection with the retaliation defense.[9]

The natural result of the trial court's reasoning is to expend more, rather than fewer, judicial and litigant resources over landlord-tenant matters. Following the trial court's logic, a court could dismiss a tenant's counterclaim at any point – including, presumably, after hearing extensive evidence regarding the housing code violations – if it determined that the tenant did not, in fact, owe rent to the landlord. Worse, it would allow a landlord facing the prospect of a

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[9] Ms. Colbert testified that Ms. Williams had reported housing code violations to the District of Columbia government, which proceeded to inspect the premises and ordered the landlord to make repairs. 6/22/06 Tr. at 137-38. During Ms. Colbert's examination, the trial court emphasized that her testimony related only to Ms. Williams's retaliation defense and not to her now-stricken counterclaims: "[T]he nature of these violations is not what we're here to litigate, as I understand it, just that there were some, and that Ms. Paul either did or didn't know about it." Id. at 142.

It should also be noted that because Ms. Williams was paying a protective order in this matter, the court ultimately would have been required to hear evidence regarding housing conditions in connection with the disbursement of funds in the court registry. See McNeal v. Habib, 346 A.2d 508, 514-15 (D.C. 1975). Addressing Ms. Williams's counterclaim would have required virtually no additional use of court resources than were already required for the McNeal hearing. In addition, this Court has recognized that in the protective order context, efficiency concerns weigh in favor of hearing such evidence regardless of the nature of the underlying possessory claim. As the Court noted in McNeal, "[t]he parties and the money are already before the court; it would be pointless to call for instituting a new proceeding as a means of concluding the existing one." 346 A.2d at 515.

large judgment for overpaid rent to avoid liability by dismissing its claim at any point, presumably including on the eve of a verdict, and thereby deprive the court of jurisdiction over the tenant's counterclaim. Neither the language nor the logic of Rule 5(b) supports such an inefficient use of the court system's resources.

In short, interests of efficiency – for Ms. Williams, Ms. Paul, and the judicial system – supported moving forward with a claim that Ms. Williams had already pleaded, thoroughly investigated, and prepared to prove. The trial court's ruling served no purpose other than to sever one dispute unnecessarily into two.

b. "Fundamental fairness" supported permitting Ms. Williams to proceed with her counterclaim. It is "fundamentally fair" to the tenant, and not unfair to the landlord, to permit a tenant to pursue her counterclaim even after the landlord relinquishes her rent claim. The landlord here invoked the court's authority to resolve rent issues when she filed a claim based on nonpayment of rent. That Ms. Williams later paid the rent demanded in the complaint does not alter that fact, nor does it render it unfair to subject the landlord to a claim based on the payment of those funds. Given that the landlord would be subject to the same charges in an affirmative case brought by Ms. Williams, the only effect of striking the counterclaim was to force the tenant to litigate her claims in a costlier and more protracted manner.

In reality, the effect of the trial court's ruling was to penalize Ms. Williams for paying her rent to the landlord. Had Ms. Williams refused to make payment, she undoubtedly would have been entitled to assert counterclaims going back to the day Ms. Paul became her landlord, nearly two years previously. See Hines, 449 A.2d 1095 (holding that a tenant may assert counterclaims predating the period for which the landlord claims rent). But, because she attempted to avoid the risk of eviction by paying what Ms. Paul demanded, the trial court struck her legitimate claim to

a refund of that rent based on housing code violations. This Court has declined to interpret Rule 5(b) to punish tenants in such a manner. See id. (refusing to limit counterclaim to the period in the complaint because such a rule would "penalize a tenant who tried to improve housing code violations by negotiating with the landlord before withholding . . . . [and] would encourage tenants to withhold rent immediately or race to the courthouse" to preserve their claims).[10]

The trial court's ruling also places a substantial and unwarranted burden on Ms. Williams. Having already devoted significant time and resources to defending herself against eviction, she must now prosecute a separate civil action to recover the rent she overpaid in an effort to retain her home. The trial court's approach, moreover, is particularly unfair to tenants who, like Ms. Williams, have limited means to pursue a new affirmative case against the landlord. Free legal services are typically not available to assist tenants in civil suits for damages, and the potential recovery – here, a maximum of $550 per month between October 2004 and June 2006, or $11,550 in the unlikely event of a 100 percent rent abatement – is not enough to entice private counsel working on a contingency basis. As a result, tenants such as Ms. Williams will be forced either to navigate the Civil Actions Branch on their own, or to forgo claims that they would have been entitled to pursue had they simply refused to pay their rent. Construing Rule 5(b) to reach this result serves no useful end.

[10] The trial court's approach also makes it more likely that tenants with counsel will be advised not to pay the back rent so as to preserve their counterclaims, while those without counsel at the earliest stage of their proceedings will risk depriving themselves of the ability to pursue counterclaims by making good-faith efforts to become current. Fairness concerns weigh against an approach that leaves pro se tenants – as 99 percent of tenants in Landlord and Tenant Court are – even less able than others to litigate their meritorious housing code claims.

CONCLUSION

The judgment of the Superior Court dismissing Ms. Williams's counterclaim should be reversed, and the case remanded for trial on her claim.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellant to be delivered by first-class mail, postage prepaid, the ~~27th~~ 28th day of February, to:

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