DISTRICT OF COLUMBIA COURT OF APPEALS

No. 05-CV-879

MICHELLE KING,
LUONG LE,

Appellants,

v.

FIDELIA BERINDOAGUE,
CLELIA BERINDOAGUE,
STACIE COURBOIS,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, Landlord & Tenant Branch
No. LT 18408-05

BRIEF OF APPELLANTS

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Plaintiffs - Appellants

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Defendants - Appellees

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There were no intervenors or amici curiae below.

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QUESTIONS PRESENTED

In this case, after the Landlords filed a suit for possession based on their alleged intent to occupy the Tenants' apartment, the Tenants tendered an answer and jury demand in which they denied the Landlords' allegations and asserted a defense of retaliation. Nonetheless, on what was essentially the *pro se* Tenants' first court appearance, the initial return date having been continued due to the absence of a translator, the trial court proceeded to take testimony from the parties and entered a judgment for possession. The judgment was based on the court's factual determination that one of the Landlords intended to move into the apartment and its legal determination that a retaliation defense cannot be asserted against a claim for possession based on personal use and occupancy. The questions presented by this appeal are:

1. Whether the Tenants were entitled to a jury trial on the question whether one of the Landlords did, in fact, intend to move into the apartment, where the Tenants had offered evidence casting doubt on whether the Landlord had such an intent.

2. Whether the Tenants were entitled to a jury trial on the question whether the Landlords' attempt to recover possession of the apartment constituted retaliation, in violation of D.C. Code § 42-3505.02, where the Tenants had requested that the Landlords correct Housing Code violations in their apartment and were withholding rent pending the correction of those violations.

3. Whether the lower court's grant of judgment for the Landlords, after the Tenants had made a jury trial demand, violated Landlord and Tenant Branch Rule 6, which requires that cases be transferred to the Civil Division after a request for a jury trial is made, and Rule 13, which requires at least 5 days notice before a hearing on summary judgment.

STATEMENT OF THE CASE

This case arises out of a notice to quit in which the landlord sought to recover an apartment, allegedly for her personal use. The tenants, proceeding *pro se,* offered testimony to rebut the landlord's claim that she actually intended to occupy the apartment. Their testimony also supported their contention that the landlords' notice was, in fact, being issued in retaliation for their complaints about Housing Code violations and for withholding rent until those complaints were addressed. Although the tenants made a timely request for a jury trial, to which they were entitled under the Seventh Amendment, *Pernell v. Southall Realty,* 416 U.S. 363 (1974), the trial court (Hon. Frederick H. Weisberg) denied their request. According to the court below, as long as the landlord's testimony that she intended to occupy the apartment was convincing to the court, "there is no real contrary proof that can be offered." App. 40.

1. *The Parties.* The defendants-appellants in this case are Michelle King and Luong Le (collectively, "the Tenants"), a husband and wife who lived with their five children in the second-floor apartment at 1471 Park Road, N.W. *See* Affidavit and Financial Statement of Michelle King and Luong Le In Support Of Motion To Proceed Without Prepayment Of Costs (filed below, Aug. 3, 2005).

In October 2004, more than a year after the Tenants moved into the apartment, the building was purchased by Fidelia Berindoague and her granddaughter Stacie Courbois (collectively, "the Landlords"). App. 13, 45.[1]

On December 17, 2004, Clelia Berindoague, who is the mother of Ms. Courbois, executed an affidavit in support of a notice to quit for the Tenants' apartment, stating that she

[1] At the hearing, the Tenants testified that the prior owners had failed to give them an opportunity to purchase the building as required by D.C. law. App. 22. The issue of whether the prior owner complied with the D.C. Code § 42-3404.02 is the subject of a separate lawsuit, *King v. Davis,* CA 05-6076, and is not before this Court.

sought "to recover possession of the property/rental unit for [her] immediate and personal use and occupancy as a dwelling." App. 4. Although Clelia Berindoague was not an owner of the building (*see* App. 45), she identified herself in the Notice as "the undersigned owner of 1471 Park Rd., NW 2d Floor, Washington, DC 20010." App. 4. The Landlords' attorney also signed a 90-day notice to quit, but there is no indication in the record that the notice was received by the Tenants.

2. *The Complaint*. On June 9, 2005, the Landlords and Clelia Berindoague, who was incorrectly identified as a landlord, filed a complaint in the Superior Court's Landlord and Tenant Branch against the Tenants. The complaint, which was sworn to by Ms. Courbois, stated that the grounds for eviction were (1) "Tenant failed to vacate property after notice to quit expired," and (2) "Plaintiff/owner seeks possession for personal use & occupancy; named defendant vacated & has paid no rent for months after service." App. 2. The summons, which was executed by the Landlords' counsel, directed the Tenants to appear in court on July 7, 2005. *Id.*[2]

3. *The July 7, 2005 Hearing*. On the July 7, 2005 return date, Mr. Le was assisted by Lorien Buehler, an attorney with D.C. Law Students in Court. Ms. Buehler informed the court that Mr. Le spoke little English and that a Vietnamese interpreter was not available. App. 7. She also informed the court that Ms. King was not present because she was working. App. 8. Ms. Buehler sought a two-week continuance, "with all rights reserved," to arrange for an interpreter and for ascertainment of counsel. App. 7-8. The Landlords' attorney consented to deferring the hearing until July 21, 2005. App. 7.

[2] At the same time, the Landlords, this time not including Clelia Berindoague, filed a second complaint against "Unknown occupants/squatters/vagrants" for possession of the same apartment. Complaint, *Berindoague v. Unknown Occupants*, No. LT 18407-05.

4. *The July 21 Proceedings.* The Tenants appeared in court on July 21, 2005, for the first of two hearings that Judge Weisberg conducted that day in the case. During those proceedings, the Tenants represented themselves, although at the first hearing they received assistance from Emily Fisher, a student with D.C. Law Students in Court, and her supervisor, Ann Marie Hay. App. 11.[3]

a. Early in the first hearing, Ms. Fisher informed the court that the Tenants had prepared an answer to the complaint and a demand for a jury trial, but that due to computer problems the Clerk's Office would not allow them to file those pleadings. App. 13. Ms. Fisher then stated that the Tenants' defenses would include "an argument against the good faith of this notice to quit" and an argument that the notice to quit was served in retaliation for "complaints that they have made about the property and other activities that they have conducted." App. 13-14.

During the course of the two hearings, Judge Weisberg repeatedly expressed the view that, if Ms. Courbois testified that she intended to occupy the Tenants' apartment herself, the Tenants could not prevail under any circumstances, regardless of any evidence offered on the Landlords' bad faith or retaliation. App. 14, 16-17, 27. Initially, Judge Weisberg appeared to recognize that the Tenants were entitled to a trial, which he proposed to schedule within a few days, without regard to Ms. Hay's and Ms. Fisher's request that the Tenants be given "some time to prepare their case" and to obtain counsel and without regard to the Tenants' jury trial demand. App. 15-16. Shortly thereafter, however, Judge Weisberg proceeded to swear in Ms. King so that she could explain "why you think that Ms. Courbois' claim is retaliatory against you." App. 22.

[3] Judge Weisberg recognized that Ms. Hay and Ms. Fisher were not present in the role of counsel to the Tenants. App. 27.

Ms. King testified that "the apartment . . . conditions were so horrible and we've given them months and months and months and months to repair"; that the landlord had "dismantled the entire kitchen"; that the apartment "had no heat all winter" and "no hot water now"; that the "place is filled with dust"; and that the Tenants had withheld rent, which they believed to be their only recourse under District of Columbia law. App. 22-24. Ms. King also testified that, although she and her family had moved out of the apartment when the conditions there became intolerable, they wanted to move back because their children went to school in the neighborhood, her husband grew up there, and his mother and sister continued to live there. App. 23. In summary, according to Ms. King, "it's our neighborhood, it's our community." *Id.* She also testified that she believed that the Landlords were retaliating against the Tenants in part because of their intent to bring suit to challenge the legality of the Landlords' purchase of the building. App. 22.

Even before Judge Weisberg heard any testimony from Ms. King (or any other witness), he signaled that he was unlikely to find any merit in the Tenants' position. For example, Judge Weisberg characterized it as "grossly unfair to the landlord" for the Tenants to assert a right to remain in their apartment after having withheld rent in response to the Landlords' refusal to correct Housing Code violations, even if the Landlords "didn't appreciate the fact that you complained." App. 18. Judge Weisberg further stated that, because the apartment "is not [the Tenants'] house," it was "totally unfair" for them to seek to remain there in the face of the notice to quit, and that it was "a bad faith stalling tactic" for the Tenants to insist upon a jury trial in the matter. App. 19-21.

b. At the beginning of the second hearing held on July 21, 2005, Ms. King stated that the Tenants still had had no success in filing their answer and jury demand. App. 4. Judge

Weisberg acknowledged that the courthouse computers were not working, but stated that he would proceed to hear testimony "to determine whether or not I have to continue the case for trial." *Id.* Later, Judge Weisberg acknowledged again that the Tenants had tried "to file an answer and a jury demand alleging a defense of retaliatory eviction." App. 38. He never offered the Tenants an opportunity to submit those documents for the record.

Judge Weisberg then took testimony from Ms. Courbois, who stated that she was one of the owners of 1471 Park Road and that she intended to move into the second floor apartment rented by the Tenants. App. 41. On cross-examination by Ms. King, Ms. Courbois acknowledged that she had never been inside the second floor apartment. App. 43. She also testified that she knew nothing about the fall that Ms. King had experienced at the property, that she did not know that the Tenants had been locked out of the apartment for a 10-day period during the winter, that she was not aware that there had been no heat in the building from December through February, and that, while she had heard that the pipes burst, she had little recollection of that incident. App. 44. Finally, she testified that she was not aware that the building had been infested with rats that Ms. King described as being "the size of small dogs." App. 45.

In an effort to undermine Ms. Courbois' claim that she intended to move into the apartment, Ms. King questioned Ms. Courbois as to whether she knew the status of other apartments in the building. *Id.* Ms. Courbois testified that she was unsure of whether the basement apartment was occupied and she acknowledged that a new tenant had moved into the third floor apartment during the winter (following renovation), after she and her grandmother had

purchased the building. App. 45-46. On cross-examination, she also admitted that the fourth floor had been vacant and renovated. *Id.*[4]

After completion of her cross-examination, Ms. King again asserted her right to a jury trial and requested that she be allowed sufficient time to prepare for trial and to obtain counsel. App. 49-50. She specifically stated that "I'm not adequately prepared for trial today and I had wanted a trial by jury and one in which I had adequate time to conduct discovery." *Id.* Judge Weisberg rejected those requests. App. 50.

5. *The Court's Ruling.* Judge Weisberg concluded that, even if the Tenants could assert a defense of retaliation in a notice to quit case based on personal use, the defense was defeated. According to Judge Weisberg, "the issue in a notice to quit case of this kind is the intent of the landlord," and "if the landlord states that intent and it is convincing to the fact finder, there is no real contrary proof that can be offered." App. 40. Judge Weisberg further explained that, even if there were a claim of retaliation, it was rebutted when "Ms. Corboy [sic], who takes [an oath] to tell the truth and looks me in the eye, says clearly and convincingly that it is now and always has been her intention to move into this unit." App. 48-49. The court then granted judgment for possession to the Landlords. App. 50.

SUMMARY OF ARGUMENT

Under *Pernell v. Southhall Realty*, 416 U.S. 363 (1974), the Tenants had a right to a jury trial on any disputed issue of material fact. Here, the central issue on the validity of the notice to quit was whether the Landlords intended in good faith to move into the apartment. As this Court held in *Glekas v. Boss & Phelps, Inc.*, 437 A.2d 584, 587 (D.C. 1981), "summary judgment is

[4] Ms. Courbois was also unaware that Ms. King and Mr. Le had moved out of their apartment because of the intolerable conditions. App. 46. Ms. King testified, however, that once the apartment was appropriately repaired she and her family intended to move back. App. 23.

likely to be inappropriate when issues of motive or intent are material." As the Court also held in *Green v. Gibson*, 613 A.2d 361, 364 (D.C. 1992), a landlord-tenant case involving the sale of the tenant's apartment, "bad faith [by the landlord] presents an issue of mental state somewhat akin to disputes in which intent is at issue [which is] unquestionably an issue of material fact." Here, the Tenants elicited testimony on cross examination that the Landlord had not even seen the inside of the apartment into which she claimed she intended to move and that the Landlord had not moved into two other apartments in the building which had become vacant in the months since she and her grandmother purchased the building. The Tenants also offered testimony that they had withheld rent due to the intolerable conditions in the building -- conditions so unsafe and unsanitary that the Tenants, despite their limited resources, had been forced to seek temporary housing elsewhere. All this testimony created a genuine issue of material fact as to whether the landlord actually intended to move into the apartment.

The Tenants were also entitled to a jury trial on the defense of retaliatory eviction. Section 42-3505.02 of the D.C. Code prohibits housing providers from taking retaliatory action against any tenant who exercises a right conferred by the Rental Housing Act, including the right to complain about Housing Code violations and to withhold rent until they are corrected. Such retaliatory action may include suing to evict the tenant based on, *inter alia*, a claim that the landlord wishes to occupy the unit personally. For certain retaliatory eviction claims, including the claims raised by the Tenants, the law creates a presumption that retaliation has taken place, and it directs that judgment must be entered in the tenant's favor "unless the housing provider comes forward with clear and convincing evidence to rebut the presumption." D.C. Code § 42-3505.02(b); *Majerle Management, Inc. v. District of Columbia Rental Housing Commission*, 768 A.2d 1003 (D.C. 2001); *Youssef v. United Management Co., Inc.*, 683 A.2d 152 (D.C. 1996).

Here the trial court clearly erred in ruling that the Landlord's testimony that she intended to move into the apartment so completely undermined the Tenants' defense that there was no dispute of material fact entitling the Tenants to a jury trial. *De Szunyogh v. William C. Smith & Co.*, 604 A.2d 1, 3-4 (D.C. 1992).

The judgment below also violated the Rules of the Landlord and Tenant Branch of the Superior Court. Under Rule 6, "[i]f a trial by jury is properly demanded, the case will be certified to the Civil Division and scheduled for a trial on an expedited basis." Thus, once the Tenants made their timely request for a jury trial, Judge Weisberg was required to certify the case to the Civil Division. In addition, under Rule 13, motions in the Landlord and Tenant Branch "shall be heard not earlier than the 5th day after service of the motion." By granting judgment for the Landlords on the same day that he first raised the possibility of disposing of the case without a trial, Judge Weisberg in effect granted summary judgment for the Landlords. In doing so, he unfairly deprived the Tenants of any opportunity to prepare their defense and clearly violated Rule 13.

The trial court's award of judgment to the Landlords violated the Tenants' constitutional right to a jury trial, was contrary to the established law of this Court, and violated the Rules of the Landlord and Tenant Branch of the Superior Court.

ARGUMENT

The Supreme Court has firmly established a tenant's right to trial by jury in a landlord-tenant action. Reviewing a decision of this Court, the Court in *Pernell v. Southhall Realty, supra*, held that the Seventh Amendment to the Constitution guarantees the right, if a jury trial has been requested and if there are genuine issues of material fact precluding the entry of summary judgment. *Pernell* has been codified in SCR-LT Rule 6.

In this case, the Landlords never even moved for summary judgment. Nor did the trial court afford the Tenants the five days required by SCR-LT Rule 13 to respond to a dispositive motion. Moreover, the Landlords could not have prevailed on such a motion. Under *Pernell*, the trial court's ruling may be sustained only if the testimony demonstrated that there was no genuine issue of material fact -- in other words, if the record would have supported summary judgment in the Landlords' favor. Here, however, the lower court's impromptu hearing substituted the judge's assessment of witness credibility for the jury determination to which tenants had a constitutional right.

I. THE LANDLORDS' INTENT REGARDING OCCUPATION OF THE APARTMENT WAS A DISPUTED, GENUINE ISSUE OF MATERIAL FACT WHICH COULD BE RESOLVED ONLY BY A JURY TRIAL.

Under the District of Columbia's rental housing statute, a tenant may not be evicted from a rental unit except on the grounds specified by law. D.C. Code § 42-3505.01(a). One of those grounds, relied on by the Landlords in this case, is where the landlord "seeks in good faith to recover possession of the rental unit for the person's immediate and personal use and occupancy as a dwelling." *Id.* § 42-3505.01(d). Thus, in order to prevail on their claim for possession of the apartment, the Landlords had to prove that Ms. Courbois had a good faith intent to recover its possession for her personal use.

Here, the Tenants squarely put the Landlords' intent and good faith in issue. App. 14 (the Tenants "have an argument against the good faith of this notice to quit"); 16 (the Tenants "have an argument against the good faith of this notice to quit"); 7 ("we have two tenants who say the reason she [is] saying she wants to move in is because she's retaliating against us as tenants"); 17 (same). One of the Tenants, Ms. King, appearing *pro se*, elicited testimony from one of the Landlords, Ms. Courbois, that was inconsistent with the claim that she actually

intended to occupy the apartment herself. Under cross-examination, Ms. Courbois admitted that she had never even seen the inside of the second floor apartment that she claimed she intended to occupy with her young child. App. 43. Ms. Courbois also acknowledged that the third and fourth floor apartments had become vacant after she and her grandmother had purchased the building, but that she had not chosen to move into those units. App. 45-46.

In addition, Ms. King presented testimony about the intolerable conditions of the apartment, including lack of heat, lack of hot water, unusable kitchen appliances, and rat infestation, as well as her repeated requests for repairs and about her decision to withhold rent until those repairs were made. App. 24, 44. This testimony was sufficient to support an inference that the notice to quit was motivated by the Landlords' desire to remove the Tenants for asserting their rights under the Rental Housing Act, rather than by Ms. Courbois' bona fide intent to move into the apartment. At a minimum, this testimony raised a genuine question about the Landlords' good faith and about whether Ms. Courbois actually intended to move into the building.

In response to this evidence, the trial judge stated that, as long as Ms. Courbois testified that she intended to regain possession of the apartment for her personal use, the Tenants "couldn't possibly prove her bad faith." App. 16; *see also* App. 21 ("they can't possibly disprove that no matter what evidence they have"); 21 ("the only possible dispute could be she's not telling the truth, and you can't prove that"); 40 ("if the landlord states that intent and it is convincing to the fact finder, there is no real contrary proof that can be offered"); 48-49 (noting that any claim of retaliation is rebutted by the landlord's testimony on intent).

The lower court's ruling that the Landlords' good faith and intent could be resolved without trial is flatly contrary to numerous decisions of this Court. "It is well settled that

summary judgment is only appropriate when no genuine issue of material fact exists," that "all inferences which may be drawn from subsidiary facts are to be resolved against the movant," and that "summary judgment is likely to be inappropriate when issues of motive or intent are material and should be used sparingly in such cases." *Glekas v. Boss & Phelps, Inc.*, 437 A.2d 584, 586-87 (D.C. 1981).

In *Green v. Gibson*, 613 A.2d 361 (D.C. 1992), this Court applied those principles in a case analogous to the instant case. In *Green,* the tenant had sought to purchase the property from the landlord, but ultimately the landlord sold the property to a third party. The issue in *Green* was whether the tenant had bargained in good faith, just as the issue in this case is whether the Landlord represented in good faith that she intended to move into the Tenants' apartment. Reversing the trial court's order granting summary judgment, this Court ruled that the tenant's claim of "bad faith bargaining by [the landlord] presents an issue of mental state somewhat akin to disputes in which intent is at issue [which is unquestionably] an issue of material fact." *Id.* at 364-65.

Similarly, in the instant case, Ms. King squarely put the Landlords' intent and good faith in issue and, accordingly, the trial court erred in resolving the case without a trial. *See Virginia Academy of Clinical Psychologists v. Group Hospitalization and Medical Services, Inc.*, 878 A.2d 1226, 1233 (D.C. 2005) ("On summary judgment, the court does not make credibility determinations or weigh the evidence."); *Spellman v. American Security Bank*, 504 A.2d 1119, 1122 (D.C. 1986) (summary judgment "should be granted sparingly in cases involving motive or intent"); *Blount v. National Center for Tobacco-Free Kids*, 775 A.2d 1110, 1114 (D.C. 2001) ("The determination of a [party's] state of mind presents a question of fact, and where . . . the dispositive issue turns on the existence, *vel non*, of a prohibited motive, summary judgment is

rarely appropriate."); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations . . . are jury functions, not those of a judge.").

It is clear from the transcript that the lower court denied the Tenants' request for a jury trial, at least in part, out of concern that the delay that would accompany such a trial would be unfair to the landlord. App. 50. In *Pernell*, the Supreme Court considered this argument and flatly rejected it: "we reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial." 416 U.S. at 384. After explaining that the courts have ample means at their disposal to assure that eviction proceedings are concluded expeditiously, the Court further recognized that

> [s]ome delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as a rubber stamp for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

Id. at 385. Those principles apply with equal force to this case. The trial court erred in ruling that the issue of the Landlords' intent could be resolved solely on the basis of Ms. Courbois' testimony and without a jury trial.

II. THE TENANTS WERE ENTITLED TO A JURY TRIAL ON RETALIATORY EVICTION.

Early in the first hearing on July 21, 2005, the Tenants informed the trial court that they had attempted to file an answer and jury demand, but that they had been unable to do so because of a computer malfunction in the Clerk's Office. App. 13. That answer, which stated a defense of retaliation, was never filed because the computers were malfunctioning that entire day. App. 37. The trial judge, however, ruled that any retaliatory eviction defense would be defeated by the Landlord's testimony that she intended to occupy the apartment, so that, regardless of the

evidence that the Tenants could present, they were not entitled to a jury trial on the defense of retaliatory eviction. App. 48-49. The trial court issued this ruling at the conclusion of the hearing and stated as follows:

> Even if there were a claim of retaliation asserted and I think there is not, I would find that it's rebutted by clear and convincing evidence . . . that Ms. Corboy [sic], who takes [an oath] to tell the truth and looks me in the eye, says clearly and convincingly that it is now and always has been her intention to move into this unit. . . . And were there [a claim] of retaliation it would be rebutted by clear and convincing evidence.

Id.; *see also* App. 14, 17, 19 ("There's no basis for [a] retaliatory [eviction claim]"), 21, 26-27 (refusing to consider the Tenants' "claims of the conditions of the apartment" notwithstanding their relevance to retaliation).

At times, the trial judge seemed to suggest that retaliation could *never* be a valid defense in a landlord's suit for possession based on an intent personally to occupy the residence. At other times, however, the trial judge seemed to reason that, even if the Tenants were not legally foreclosed from asserting a retaliation defense, Ms. Courbois' testimony that she intended to move into the apartment was clear and convincing evidence rebutting the defense as a matter of law. The lower court was wrong on both counts.

A. A Tenant May Defend Against An Eviction Suit -- Including One Based On The Landlord's Purported Intent To Occupy The Premises Personally -- On The Ground That The Suit Is Retaliatory

The District of Columbia rental housing law prohibits retaliation against tenants who, like the Tenants here, complain to their landlord about Housing Code violations or withhold rent to force the landlord to make repairs. Specifically, the law provides that:

> [n]o housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon a tenant [by the rental housing laws] . . .. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit.

D.C. Code § 42-3505.02(a).

In addition, once the tenant raises the issue of retaliation based on his having engaged in certain protected activity, the burden of proof shifts to the landlord. The categories of protected activity include the tenant's giving appropriate notice to the landlord that repairs are necessary or withholding rent after having given such notice. *Id.* § 42-3505.02(b)(1) and (3). Under those circumstances, "[i]n determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact *shall presume retaliation action has been taken." Id.* § 3505.02(b)(emphasis added). Moreover, judgment must be entered in the tenant's favor "*unless the housing provider comes forward with clear and convincing evidence to rebut this presumption.*" *Id.*

The trial court was incorrect in suggesting that a tenant may not state a valid retaliation claim when a landlord seeks to evict the tenant based on the landlord's purported intent to use and occupy the premises personally. Nothing in the statute, the implementing regulations, or the case law establishes such a limitation on tenants' protection against eviction.

Indeed, this Court's decision in *De Szunyogh v. William C. Smith & Company, Inc.*, 604 A.2d 1 (D.C. 1992), makes clear that, even when a suit for possession purports to rely on one of the permissible grounds for eviction stated in the Rental Housing Act, the tenant may still assert a defense of retaliation in violation of D.C. Code § 42-3505. In *DeSzunyogh*, this Court reviewed a ruling by the trial court that barred a tenant from presenting the defense of retaliation to the jury, where the tenant had complained to the landlord that the apartment was in need of repair. The Court held that as long as the tenant alleged that she engaged in conduct protected under the retaliatory eviction statute (which includes complaints about Housing Code violations and withholding of rent to induce their correction), the tenant was entitled to present the issue of

retaliation to the jury. The Court distinguished *Wahl v. Watkis*, 491 A.2d 477 (D.C. 1985), on which the trial judge in this case relied (App. 49), as a case in which the tenant had not stated an allegation of retaliation. 604 A.2d at 4. *DeSzunyogh* has been repeatedly adhered to by this Court in recognizing that tenants are entitled to a trial on the issue of retaliation. *E.g.*, *Majerle Management, Inc. v. District of Columbia Rental Housing Comm.*, 768 A.2d 1003, 1009 (D.C. 2001); *Youssef v. United Management Co., Inc.*, 683 A.2d 152, 155 (D.C. 1996).

B. The Tenants Here Made Out A Retaliation Defense Sufficient To Avoid Summary Judgment For The Landlords.

The Tenants made a sufficient factual showing in support of their retaliation defense to avoid summary judgment for the Landlords. Although the Tenants were not permitted to file their answer alleging retaliation, Ms. King testified that her apartment contained numerous serious violations of the Housing Code: that there was no heat in the unit during those winter months; that there was no hot water; that the Landlords had dismantled the kitchen; and that the building was infested with rats. App. 23, 45. Such conditions would plainly violate the D.C. Housing Code. *See, e.g.*, D.C. Mun. Regs. tit. 14 §§ 606.1; 601.2, 701.1; 804. In addition, Ms. King testified that she had notified the Landlords of those conditions and had withheld rent pending their correction. App. 24. In at least two respects, therefore, the Tenants engaged in the sort of protected conduct that qualifies for the statutory presumption of retaliation and the heightened standard of proof. D.C. Code. §§ 42-3505.02 (b)(1) and (3). Nevertheless, the trial court denied the Tenants a jury trial on the issue of retaliation. App. 48-49.[5]

[5] Section 42-3505.02(b) states that the presumption applies if the complaints to the landlord were witnessed or in writing. Because the lower court assumed that the heightened standard applied, it did not request evidence on whether the complaints were witnessed or in writing. If permitted to present evidence at trial, the Tenants are prepared to present evidence that their complaints about the conditions of the apartment were in writing and were witnessed, and that they documented that they were withholding rent due to the conditions of the dwelling.

The trial court erred in ruling that, even if the statutory presumption and heightened standard of proof applied, the Landlords were entitled to summary judgment on the retaliation defense, solely because the court found that Ms. Courbois was credible in testifying that she intended to move into the apartment. As the court put it, because Ms. Courbois "looks me in the eye [and] says clearly and convincingly that it is now and always has been her intention to move into this unit . . . retaliation would be rebutted by clear and convincing evidence." App. 48-49. But this ruling is also plainly error since, as explained above, Ms. Courbois' credibility cannot be determined on summary judgment. Protection against retaliation for asserting a tenant's rights is an important safeguard, because without such protection many violations would go undetected. *See Jackson v. Birmingham Board of Education,* 544 U.S. 167 (2005) (noting importance of protection against retaliation for identifying violations of Title IX).

Even if there were valid arguments that the trial court could determine the issue of intent in the context of a challenge to the notice to quit without a jury trial, which is not the case, certainly there could be no justification for finding that the landlord had rebutted the retaliation claim by clear and convincing evidence. For this reason also, the decision below must be reversed.

III. THE TRIAL COURT'S ORDER IN EFFECT GRANTING SUMMARY JUDGMENT VIOLATED LANDLORD AND TENANT BRANCH RULES 6 AND 13.

In effectively entering summary judgment at the initial hearing in the case, the trial court not only violated the Seventh Amendment, for the reasons explained above, but also violated Rules 6 and 13 of the Superior Court Rules of Civil Procedure for the Landlord and Tenant Branch. The trial court failed to follow the procedure mandated by Rule 6 when the Tenant makes a timely request for a jury trial. In addition, the trial court failed to afford the

tenants the five days mandated by Rule 13 to respond to a dispositive motion (which the Landlords had not even made in this case, but which the court might be deemed to have made on the Landlords' behalf). The trial court did so notwithstanding the *pro se* Tenants' protests that they were not prepared to proceed to the merits and needed additional time to prepare their case and to attempt to obtain counsel. App. 49.

Rule 6 recognizes the right to jury trial granted in *Pernell v. Southhall Realty, supra.* Rule 6 provides in pertinent part that "[i]f a trial by jury is properly demanded, the case *will be certified* to the Civil Division and scheduled for trial on an expedited basis." SCR-LT 6 (emphasis added). Thus, once the Tenants demand a jury trial, the case should have been certified to the Civil Division. *See Davis v. Rental Associates, Inc.*, 456 A.2d 820, 823 (D.C. 1983) ("Although actions for possession had traditionally been characterized as summary proceedings, the summary nature of such actions was to some extent altered by permitting tenants to proceed to a jury trial upon a timely request and a statement of facts underlying a defense."). Even if a motion for summary judgment had been made and were ripe for decision, Judge Weisberg should not have ruled on the merits of the case, but instead should have certified the case to the Civil Division.

In addition, even if Judge Weisberg had the authority to grant summary judgment, he violated the Rule 13 requirement that motions in the Landlord and Tenant Branch "shall be heard *not earlier* than the 5th day after service of the motion." SCR-LT 13(c)(emphasis added). Although the Landlords never moved for summary judgment, Judge Weisberg's decision can only be sustained if the court would have been justified in granting of summary judgment. But Judge Weisberg first raised the possibility of ruling without a trial on July 21, 2005, the same day that he granted judgment for the Landlords. This procedure deprived the Tenants of any

meaningful opportunity to obtain counsel, to prepare for trial or to explore (though a request for discovery or otherwise) any other defenses.[6] It flatly violated Rule 13. That was particularly unfair in this case, in which the notice to quit and the complaint were based on Clelia Berindoague's sworn intention to occupy the unit, rather than her daughter's. *See* D.C. Code §42-3505.01(a) (requiring notice in detail). Thus, the Court entered judgment on the basis of allegations that had not even been made in the Landlords' complaint.

CONCLUSION

The decision below should be reversed and the case should be remanded with directions to certify the case to the Civil Division for a jury trial on, among other things, whether the Landlords' intend to occupy the apartment and whether the notice to quit was issued in retaliation for the Tenants' asserting their rights under District of Columbia law.

Respectfully submitted,

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[6] For example, the Tenants may have been able to obtain dismissal on the ground that the complaint was defective because Clelia Berindoague incorrectly represented herself as an owner in the affidavit submitted in support of the notice to quit (App. 4), that Clelia Berindoague was incorrectly listed on the Complaint as an owner of the building (App. 2) and that service of the notice to quit was defective (App. 3). The Tenants never even had an opportunity to request discovery on these issues.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Brief of Appellants and a copy of the Joint Appendix to be delivered by first-class mail, postage prepaid, this 31st day of January, 2006, to counsel for Appellees: Stephen O. Hessler; Hessler & Associates; Suite 800;1200 G Street, NW; Washington, DC 20005.

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