No. 05-CV-00259

DISTRICT OF COLUMBIA COURT OF APPEALS

RAESHEEDA BALL,

Appellant

v.

ARTHUR WINN GEN. PARTNERSHIP/SOUTHERN HILLS APARTMENTS,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA,
CIVIL DIVISION, LANDLORD AND TENANT BRANCH
(Argued March 16, 2006)

APPELLANT'S SUPPLEMENTAL BRIEF REGARDING *CRESCENT PROPERTIES v. INABINET*

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INTRODUCTION

In Crescent Properties v. Inabinet, No. 03-CV-1449 (D.C. Apr. 20, 2006), this Court held that a tenant's home was not a "drug haven" under the Residential Drug-Related Evictions Act (RDEA), D.C. Code §§ 42-3601 to 42-3610, despite evidence that a household member had been seen using illegal drugs there on multiple occasions and that the home "had a reputation in the neighborhood as the site of heavy drug activity." Slip op. at 2-3. Here, in contrast, the trial court allowed the jury to find that Ms. Ball's home was a "drug haven" on the basis of a single drug-related incident that occurred more than a year before trial and that did not involve the tenant or any member of her household. The outcomes of the two cases cannot be reconciled.

Crescent Properties bears on this case in at least two ways. First, Crescent Properties holds that, in order for a tenant to be subject to eviction under the RDEA, the trier of fact must find that, at the time of trial, the tenant's home "currently remain[s] a drug haven or nuisance." Slip op. at 13. The jury in this case, however, was instructed to consider whether Ms. Ball's home "was" a drug haven at any time in the past. It was not required to find that drug activity occurred there on more than one occasion, much less that it was continuing up until the time of trial. Moreover, because the landlord's case focused on that one incident, without any evidence of drug activity in Ms. Ball's home at any subsequent time, the jury may well have found a drug haven based on that incident alone. That was error under Crescent Properties.

Second, in concluding that the RDEA authorizes eviction only when drug activity is ongoing at the time of trial, the Court in Crescent Properties carefully considered the text of the statute as a whole, the ordinary meaning of its terms, and the purpose that the Council was seeking to advance. Here, however, the trial court read the statutory definition of "occupant" in isolation, which led the court to conclude that the term covers anyone who was in the unit with the tenant's or the

landlord's permission for even a short period of time. Applying the analytical approach of Crescent Properties compels the conclusion that the Council did not intend the term "occupant" to encompass temporary guests, occasional babysitters, maintenance personnel, and others who do not live in the unit and thus could not be "evicted" from it. Otherwise, the statute would impose a form of strict liability that is inconsistent with the Council's adoption of the traditional "public nuisance" approach rather than the novel approach of the federal "one-strike" law that the Council considered and rejected.

ARGUMENT

I. CONTRARY TO *CRESCENT PROPERTIES*, THE TRIAL COURT PERMITTED THE JURY TO FIND FOR THE LANDLORD WITHOUT FINDING THAT MS. BALL'S APARTMENT WAS A DRUG HAVEN AT THE TIME OF TRIAL

A. *CRESCENT PROPERTIES* MAKES CLEAR THAT A RENTAL UNIT IS A "DRUG HAVEN" ONLY IF IT IS A SITE OF CONTINUING DRUG ACTIVITY

As detailed in our principal brief (at 25-29), the RDEA is a tool for evicting tenants from units that display an ongoing pattern of drug activity. As "a mechanism for 'eliminating drug trafficking in housing accommodations,'" the statute provides landlords with an expedited eviction process to target sites of serious drug activity. Crescent Properties, Slip op. at 5 (quoting Cook v. Edgewood Mgmt. Corp., 825 A.2d 939, 945 (D.C. 2003)). It does not apply to evict tenants based on a sole instance of drug activity that occurred well in the past.

Crescent Properties holds that, to warrant eviction under the RDEA, the trier of fact must find that the premises remains a drug haven – in other words, that, at the time of trial, the tenant's unit is "a property where drugs are illegally stored, manufactured, used, or distributed." Slip op. at 8 (emphasis in opinion) (quoting D.C. Code § 42-3601(8)). At issue in Crescent Properties was an apartment that, prior to trial, had indisputably been the site of "heavy drug activity," largely by the tenant's adult daughter, who lived there. Id. at 2-3. The evidence showed that, before the RDEA

case was filed, the tenant's daughter had a heart attack that left her "brain dead" and permanently hospitalized. See id. at 3. No witness testified to observing any drug activity at the unit after that time, although the property manager testified that she continued to see drug users on the tenant's back porch, which was accessible from a public street. See id.

The trial court ruled for the tenant. It found that, although there was "ample evidence" that the unit had been a drug haven at one time, the landlord had not established that it remained a drug haven, as required to prevail under the RDEA. See Slip op. at 4. In affirming the trial court's decision, this Court focused on the text, structure, and purpose of the RDEA, reasoning that the statute's use of the present tense – referring to a unit that "is" a drug haven, not a unit that "was" a drug haven – requires a finding that the unit is an ongoing site of drug activity. Id. at 8. The Court also noted that one of the factors to be evaluated in determining the existence of a drug haven is whether the drug activity has been discontinued. See id. (citing D.C. Code § 42-3602(a)(6)). By permitting eviction only where the activity is ongoing or can be expected to resume, the statute effectuates the Council's purpose of "eliminating the drug trafficking" that has become "habitual" at the rental unit, creating a nuisance for the surrounding community. Id. at 5, 8; see Council of the District of Columbia, Committee on Consumer and Regulatory Affairs, Committee Report on Bill No. 8-194, The Residential Drug-Related Evictions Act of 1990, Amendment in the Nature of a Substitute (Jan. 24, 1990) (hereinafter "Committee Report"), at 7 (cited in Brief of Appellant at 28).

In determining that the property must currently be a drug haven in order to warrant eviction, Crescent Properties invoked the statute's equation of a "drug haven" to a "public nuisance." Slip op. at 7, 8. The Court's conclusion that the harm must be ongoing is consistent with the public nuisance model, which is concerned with protecting the public by abating future harm –

not punishing illegal activity that occurred in the past. See Graul v. United States, 47 App. D.C. 543, 546 (D.C. 1918) ("The criminal action punishes for what has been done. The equity proceeding [to suppress houses of prostitution] looks to future conduct.").

The rule of Crescent Properties thus is as follows: A finding that a rental unit was a site of drug activity on one occasion – or even that the unit was a drug haven for some period of time in the past – is not sufficient to warrant eviction under the RDEA. Rather, the trier of fact must find that the unit "remains a drug haven" at the time of trial. Slip op. at 9. Evidence of past drug activity is relevant to that inquiry only to the extent that it suggests that such activity is ongoing or, if it has temporarily ceased, can be expected to resume. Moreover, the tenant's ability to raise a defense that the drug activity complained of is "not part of a pattern or practice of the tenant or occupant of the unit," D.C. Code § 42-3604(c)(2), does not alter the landlord's obligation to "establish[], by a preponderance of the evidence, that [the] rental unit in question is a drug haven or that a nuisance currently exists there." Slip op. at 11; see Brief of Appellant 27-28.

B. THE TRIAL COURT ERRONEOUSLY ALLOWED THE JURY TO FIND A DRUG HAVEN BASED ON A SINGLE DISCRETE INSTANCE OF DRUG ACTIVITY MORE THAN A YEAR BEFORE TRIAL

The Court's construction of the RDEA in Crescent Properties is at odds with the construction adopted by the trial court here. In rejecting Ms. Ball's motion for a directed verdict based on insufficient evidence, and ruling that the landlord had made out a prima facie case under the RDEA, the court held that the sole instance of prior drug activity was sufficient for the jury to find a drug haven. See Tr. 92-93.[1] As Crescent Properties makes clear, however, the RDEA does not permit

[1] In so holding, the trial court rejected the argument of Ms. Ball's counsel that a drug haven could not, as a matter of law, be based on that single past incident of drug activity: "They have shown one incident going to one factor among 6 u[n]der the drug haven law. Even leaving aside the argument regarding occupant, one incident does not a drug haven make. It simply is not enough to get over that initial [–]." Tr. 89. A similar argument was made in Ms. Ball's prior

eviction unless the tenant's unit is found to be a drug haven at the time of trial. It is not enough that a unit was a drug haven – much else the site of a single drug-related incident – many months in the past. Slip op. at 9.

In this case, the landlord's complaint alleged, and the landlord's case in chief sought to prove, a single drug-related incident on January 14, 2004, that did not involve Ms. Ball or any member of her household. (It was undisputed that Ms. Ball was not home at the time, that the only household member who was present was her infant daughter, and that Ms. Ball was never charged in connection with the incident.) Such evidence cannot satisfy the landlord's burden under Crescent Properties to show "that [the tenant's] property currently remained a drug haven or nuisance at the time of the hearing." Slip op. at 13.

Nor can the deficiencies in the landlord's case be cured by the rebuttal testimony of Officer James Boteler, who stated that suspected drug dealers had entered Ms. Ball's apartment on a few recent occasions and that one was arrested there for an assault committed elsewhere. The landlord, having offered Officer Boteler as a previously undisclosed witness for "impeachment" purposes, was not entitled to rely on his testimony for substantive purposes.[2] Moreover, even if admitted as

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submissions to this Court. See, e.g., Brief of Appellant at 25 ("First, the statute itself defines a drug haven as a housing unit 'where drugs are illegally stored, manufactured, used, or distributed.' D.C. Code § 42-3601(8) (emphasis added). Defining a drug haven in this way, rather than as a unit where drugs 'were' present, suggests an ongoing violation of the law, which poses a continuing threat to the building and the neighborhood.").

[2] The trial court appears to have rested the admission of Officer Boteler's testimony on "the parties right not to reveal impeaching or rebutting evidence" (Tr. 165), rather than exercising discretion not to impose sanctions for the landlord's failure to identify the witness in response to interrogatories that asked it to identify the incidents of drug activity relied on and the basis for claiming that they constituted a pattern or practice (Tr. 163). Even if the court was exercising discretion not to impose sanctions, it did so with the understanding that the evidence was offered solely to impeach, and not as substantive evidence. See Dalo v. Kivitz, 596 A.2d 35, 36 n.1 (D.C. 1991) (sustaining exercise of discretion to admit evidence for limited purpose of impeachment); R & G Orthopedic Appliances, Inc. v. Curtin, 596 A.2d 530, 537 (D.C. 1991) (trial court erred in

substantive evidence, rather than solely as impeachment, Officer Boteler's testimony does not prove any recent drug activity in Ms. Ball's apartment (or otherwise by Ms. Ball or any member of her household). If anything, the evidence of close police observation of the building in the months before the trial highlights the absence of any evidence of recent drug activity in Ms. Ball's own unit.[3]

In any event, the trial court permitted the jury to find against Ms. Ball under the RDEA based solely on the single past incident of drug activity in her unit, without regard to whether any ongoing drug activity had been proved. Contrary to Crescent Properties, the trial court's instructions focused the jury on whether Ms. Ball's apartment was a drug haven in the past, not on whether the apartment was a drug haven at the time of trial. Although the trial court correctly

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excluding testimony of undisclosed witness who was "an impeachment witness, not a substantive one"). And even impeachment evidence must be disclosed in response to a discovery request. See Varga v. Rockwell Int'l Corp., 242 F.3d 693, 697 (6th Cir. 2001); Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513 (5th Cir. 1993); 8 Wright & Miller, Federal Practice & Procedure § 2015 at 212 (1994) & 2005 Supp. at 62. The pretrial order in this case reinforces the limited scope of Officer Boteler's testimony. The order prohibited calling any undisclosed witness at trial "except for purposes of impeachment, i.e., the witness/exhibit related solely to the credibility of the other party." Appellee's Br. at 10. The federal courts refuse to allow evidence withheld from mandatory disclosure as "solely for impeachment" to be used as substantive evidence. See Cooley v. Great Southern Wood Preserving, 2005 WL 11163608, *10, 2005 U.S. App. LEXIS 8932 (11th Cir. May 18, 2005); Klonoski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998). Certainly, a party that succeeds in escaping exclusionary sanctions by offering evidence solely for impeachment may not rely on such evidence to fill an evidentiary gap in its prima facie case. See Lomascolo v. Otto Oldsmobile-Cadillac, Inc., 253 F.Supp.2d 354, 359-61 (N.D.N.Y. 2003) (limiting evidentiary use at trial based on party's position that the evidence is "solely for impeachment purposes.").

[3] The landlord also offered the conclusory testimony of Marquida Howard, the property manager, that "the complaints have not stopped" about Ms. Ball's apartment. Tr. 41. The landlord failed even to elicit testimony as to what those alleged "complaints" were, much less to establish that there was any validity to them. In other respects, Ms. Howard's testimony reflected an incorrect or incomplete understanding of the facts. For example, although Ms. Howard testified that the notice to quit was issued to Ms. Ball based on the January 14, 2004, incident and other "complaints" (Tr. 37), the notice, in fact, referred only to the single incident (App. A). And, although Ms. Howard testified that the landlord had issued a barring notice against Mr. Anderson (Tr. 39), Theresa Fauntroy, Mr. Anderson's mother, testified that the landlord had never spoken with her about Mr. Anderson's drug activity, and both she and Ms. Ball testified that Mr. Anderson continued to visit the building although he no longer lived there (Tr. 124, 127, 156).

read the statute, including its present-tense language, in its initial instruction, the court went on to direct the jury to consider whether "the rental unit in question here was a drug haven," not whether it is one, as required by Crescent Properties. Tr. at 189 (emphasis added). The court went on to use the past tense repeatedly in its remaining instructions:

- "The plaintiff claims in this lawsuit that the defendant or the occupants of 4331 Fourth Street, Southeast Washington, D.C., unit 2, were using the premises as a drug haven, in violation of District of Columbia law." Tr. 187 (emphasis added).

- "In determining whether the landlord has proved that the rental unit number 2 was used as a drug haven you shall consider the following ...." Tr. 188 (emphasis added).

- "Those are the 7 factors that the statute gives you to consider in determining whether the landlord has proved by a preponderance of the evidence that the rental unit in question here was a drug haven." Tr. 189 (emphasis added).

- "If you find that the plaintiff has proven by a preponderance of the evidence that the tenant or the tenant's guests or other persons who are under the tenant's control have used the rental unit as a drug haven then the burden of proof shifts to the defendant." Tr. 190 (emphasis added).

- "So, the burden is on the plaintiff to prove by a preponderance of the evidence that the tenant or an occupant, a person she had authorized to be there, used the premises as a drug haven by consulting with those 7 factors and considering them." Tr. 191 (emphasis added).

These instructions permitted the jury to find against Ms. Ball so long as it believed that her unit was a drug haven at some time in the past – even if it believed that any drug activity was limited to a single incident and was not continuing at the time of trial. As Crescent Properties makes clear, the RDEA does not permit eviction in such circumstances. A landlord instead must persuade the trier of fact that the unit "remains a drug haven at the time of the hearing." Slip op. at 13. The jury was not required to consider that question in this case.

II. THE ANALYTICAL APPROACH OF *CRESCENT PROPERTIES* PRECLUDES THE EVICTION OF A TENANT AND HER FAMILY BASED ON THE CONDUCT OF A MERE GUEST

Crescent Properties also informs the analysis of whether the trial court erred in allowing the jury to find that Ms. Ball's apartment was a drug haven based solely on the activity of Siddiq Anderson, who did not live in Ms. Ball's apartment but who was there for a few hours on January 14, 2004, to care for her infant daughter. That question turns on whether the statutory term "occupant" encompasses not only a person who is living in the unit, but also anyone who visited there for even a short period of time with the tenant's or landlord's permission. Crescent Properties reinforces that, in order to resolve questions of statutory construction, a court should not focus on a single word, phrase, or sentence in isolation, but should consider the statute as a whole, the ordinary meaning of its terms, and its purpose and history. Application of that approach leads to the conclusion that the term "occupant" in the RDEA is synonymous with "resident."

As Crescent Properties confirms, ascertaining the meaning of the RDEA, like any statute, begins with its language, construing "the words of the statute . . . according to their ordinary sense and with the meaning commonly attributed to them.'" Slip op. at 5. The Court also recognized the necessity to read the statute as a whole, "harmonizing" any provisions that might otherwise be in tension. Id. at 8; see Cook, 825 A.2d at 946 (construing the RDEA requires consideration of the "statute's full text, language as well as punctuation, structure and subject matter") (quoting United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (internal quotation marks and citation omitted)). The Court also recognized the relevance of the statute's purpose and history, including the legislature's rejection of available alternative language. See Slip op 5. 10-11.

The Court's holistic approach to construing the RDEA in Crescent Properties is inconsistent with the trial court's narrow focus on the statutory definition of "occupant" – "a person authorized by the tenant or housing provider to be on the premises of the rental unit," D.C. Code § 42-3601(16) – to conclude that the term covers anyone who has been allowed into the unit for even the most limited purpose or the most limited period of time. The text of that provision, even standing alone, does not unambiguously support the trial court's position, for it does not clarify the scope or duration of the authority that the purported occupant need receive from the tenant or landlord. Other clues to the meaning of the RDEA, as identified in Crescent Properties, undermine the trial court's position.

First, as discussed in our principal brief, the term "occupant," in its "ordinary sense and with the meaning commonly attributed" to it (Slip op. 5), refers to one who lives on the premises, not one who is merely visiting. Numerous decisions of this Court use the word "occupant" to refer to one who resides in a housing unit without the rights of tenancy. See Brief of Appellant at 17-19. The trial court's contrary construction of that term ignores its ordinary meaning, particularly in the context of landlord-tenant law.[4]

Second, reading the RDEA as a whole – as the Court did in Crescent Properties – makes clear that the term "occupant," as used in the law, refers to someone living in the rental unit. Applying the term to visitors, as the trial court did here, cannot be squared with the numerous

[4] The term "occupant," as used elsewhere in D.C. statutes and regulations, also refers to a resident of a premises rather than a visitor. The housing code, for example, defines an "occupant" as "any person over one year of age, living, sleeping, cooking, or eating in, or having actual possession of a habitation." 14 D.C.M.R. § 199. Similarly, the fire code refers to a "residential facility" as a place providing "lodging or boarding for institutional occupants." D.C. Code § 6-751.01; see D.C. Code § 42-3301 (referring to an apartment house with units "exclusively for use of and under the control of the occupant"); D.C. Code § 16-1101 (permitting an action for ejectment to be brought against any "occupant" of the premises); D.C. Code § 42-3402.10 (distinguishing tenants from "occupants for security or similar nontenancy purposes" for purposes of Conversion and Sale Act).

provisions of the RDEA that refer to evicting a "tenant or occupant," as it makes no sense to "evict" a temporary guest at the home. See Brief of Appellant at 19-20. To "harmonize" these provisions, as directed by Crescent Properties, the term "occupant" must be understood, in accordance with its ordinary meaning, as a household member, not a visitor to the premises.

Third, Crescent Properties makes clear that a statute's purpose is a crucial guide to statutory interpretation, and that "[i]n appropriate cases, we also consult the legislative history." Slip op. at 5 (quoting Abadie v. District of Columbia Contract Appeals Bd., 843 A.2d 738, 742 (D.C. 2004)). The purpose of the RDEA, as delineated in the Council's Committee Report, was to provide an expedited process "to evict residents who use, sell or possess drugs." Committee Report 7 (quoted in Brief of Appellant at 21); see id. at 5 (referring to the drug activity of a "member of the household").[5] Nothing in the RDEA's purpose or history suggests that the Council intended to facilitate the eviction of tenants and other residents based on drug activity engaged in by a mere guest without their participation or knowledge.

Finally, as Crescent Properties recognizes, the Council modeled the RDEA on the law of public nuisance, not on the strict-liability approach of the federal "one-strike" law. See Slip op. at 7-8. Nuisance law imposes a duty to abate on a person who has notice of the nuisance and the capacity to abate it. It does not make one liable for the conduct of third parties whom one cannot control. See, e.g., District of Columbia v. Beretta, U.S.A. Corp., 872 A.2d 633, 648, 650 (D.C.

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[5] The Committee Report also cited Kellner v. Cappellini, 516 N.Y.S.2d 827 (N.Y. Civ. Ct. 1986), which applied the New York eviction statute on which the RDEA is modeled. See Committee Report at 8-9; Cook, 825 A.2d at 952 (noting the Council's reference to Kellner in enacting the RDEA). Kellner involved a crack house that more than 30 people were regularly seen entering and exiting, presumably for illegal purposes. See 516 N.Y.S. 2d at 829-30. The eviction action, however, proceeded not against those guests, but only against those "in possession" of the unit – the three individuals, described as "occupants," who lived on the premises. Id. at 828, 829. The Council's reference to the Kellner case further supports the conclusion that it understood "occupant" in the RDEA to describe those who lived in a rental unit, not those who were visiting the premises, even for the purpose of engaging in drug activity.

2005) (en banc); District of Columbia v. Fowler, 497 A.2d 456, 461-62 (D.C. 1985); Thomas Circle Ltd. P'ship v. United States, 372 A.2d 555, 556-57 (D.C. 1977); Holmes v. United States, 269 F. 489, 491 (D.C. 1920). Consistent with those authorities, the Council should not be presumed to have made a tenant responsible for drug activity, of which the tenant was not aware, that was engaged in by a mere visitor at a time when the tenant was absent from the premises.

The Council, in enacting and amending the RDEA, could have adopted the language of the federal "one-strike" law, which expressly requires that leases for public and subsidized housing authorize eviction for drug activity by the "tenant, any member of the tenant's household, or any guest or other person under the tenant's control." 42 U.S.C. § 1437d(*l*)(6) (emphasis added); see 42 U.S.C. § 1437f(d)(1)(B)(iii). The Council's failure to do so is telling. Although it considered the provisions of the federal law in debating the RDEA, the Council chose to enact a more narrowly tailored statute – one that allows eviction when a resident is "subject[ing] other residents to dangers and nuisances" as a result of the resident's ongoing drug activity. Brief of Appellant at 15 (quoting Committee Report, at 4). The trial court's interpretation of "occupant," however, subverted the Council's purpose by permitting the jury to find against Ms. Ball based on the isolated actions of a guest in her home. While such a result may have been intended by Congress under the federal "one-strike law – see, e.g., Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002); Scarborough v. Winn Residential L.L.P., 890 A.2d 249 (D.C. 2006) -- the statutory text, structure, and purpose all indicate that the Council did not intend such a result under the RDEA.[6]

[6] As the landlord acknowledged at oral argument, the instructions in this case misconstrued the RDEA by permitting the jury to reject Ms. Ball's affirmative defenses and find against her based on the actions of a visitor over whom she had no control. The RDEA, unlike the federal one-strike law, specifically permits a tenant or occupant "against whom the action was filed" to avoid eviction by showing that he or she "could not reasonably have . . . known" of the drug activity at

CONCLUSION

For the foregoing reasons, and those stated in our principal brief and reply brief, the decision below should be reversed.

Respectfully submitted.

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issue or that such activity was "not part of a pattern or practice" of that tenant or occupant. D.C. Code § 42-3604(c). The trial court negated this "innocent tenant" defense, however, by instructing the jury that Ms. Ball could prevail only by showing that neither she nor "any authorized occupant" could reasonably have known of the incident(s) giving rise to the drug haven finding or that those incident(s) were not part of a pattern and practice of "the defendant or any authorized occupant of the unit." Tr. 202-03. The court's instructions thus converted the RDEA into precisely the form of strict liability statute that the Council rejected in enacting the RDEA.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2006, a copy of Appellant's Supplemental Brief Regarding *Crescent Properties v. Inabinet* was served by first-class mail on:

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