DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 04-CV-1074 & 05-CV-100

MARIA T. WILSON,

Appellant,

v.

MODERN MANAGEMENT CO.,

Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division, Landlord & Tenant Branch
(L & T Case No. 044441-03)

BRIEF OF APPELLANT

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ISSUE PRESENTED FOR REVIEW

Whether the entry of an eviction judgment as a sanction without considering defenses of fraud and unconscionability that negated the purported lease agreement and the existence of a landlord tenant relationship was an abuse of discretion when: (1) the trial court erroneously concluded that the defenses could not be asserted in a landlord tenant case; and (2) the trial court erroneously concluded that the defenses had already been eliminated as a result of an earlier ruling striking a plea of title defense.

STATEMENT OF THE CASE

This case involves a "foreclosure rescue" scam, in which a vulnerable homeowner is stripped of the equity in his or her property through a phony sale and leaseback transaction. *See Browner v. District of Columbia*, 549 A.2d 1107 (D.C. 1988) (describing similar sham sale and leaseback scheme).[2] The scam begins with an offer to help an owner who has received a foreclosure notice to protect the owner's interest in the property. The owner unwittingly executes documents purporting to transfer title and to lease the property back for a year with the right to repurchase it at a substantial markup. The transaction is represented to the owner as a way to temporarily refinance property under immediate threat of foreclosure, not a true sale. The lender actually pays the

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2 *See also* National Consumer Law Center, Dreams Foreclosed: The Rampant Theft of Americans' Homes Through Equity-Stripping Foreclosure 'Rescue' Scams (June 2005) 8-9 (describing scams generally); 19-20 (District of Columbia scam); *United States v. Delta Funding Corp.*, Civ. Action No. 00-1872 (April 2000) (settlement).

mortgage company only enough to prevent foreclosure, leaving the owner still obligated on the mortgage and the "rent" charged under a sham lease. The lender records title to the property after paying only a fraction of its value. The final step is to evict the owner and obtain possession of the property so that it can be sold at a hefty profit.

In this case, Vincent Abell and Modern Management Co. "rescued" Maria Wilson from a threatened foreclosure of the mortgage on a single family home she had owned since 1981. Abell acquired a deed for the property and Modern Management Co. "leased" it back to Ms. Wilson.[3] Two months later, Modern Management sued Ms. Wilson in landlord tenant court. The court (Hedge, J.), ordered Ms. Wilson evicted as a sanction for failing to make timely protective order payments, without considering her defenses of fraud and unconscionability.

A. Maria Wilson's Taylor Street Property

Maria Wilson purchased a home at 1360 Taylor Street, N.W., in 1981. In 1998, she suffered a left frontal lobe aneurysm that put her into a coma and left her temporarily blind and paralyzed. She suffers memory loss and seizures. She is unable to work, and has been declared totally disabled by the District of Columbia Department of Human Services Medical Review Board. (JA 127). Because of her condition, she resided with her mother, rather than in the property she owned. (*Id.*).

Over time, Ms. Wilson's financial situation became more and more precarious, and she was unable to meet the mortgage payments on the property.

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[3] Abell was prosecuted and convicted for criminal activity in his previous career as a real estate agent. Sandra Fleishman, From Foreclosure to the Cleaners, Washington Post, A1 (Dec. 25, 2004).

B. The Foreclosure Notice.

In September 2003, Ms. Wilson received a notice that her property at 1360 Taylor Street, N.W., would be sold at a foreclosure sale on October 2, 2003. (JA 58). According to the notice, the balance owed on her mortgage was $195,202.32. (*Id.*). The minimum payment required to cure the mortgage default was $42,524.92. (*Id.*). At the time, the property had an appraised value of about $265,000, leaving Ms. Wilson with at least $60,000 in equity. (JA 132). Her monthly payment was $1569.67. (JA 37, 43).

C. The Foreclosure "Rescue."

Shortly after receiving the foreclosure notice, about September 27, 2003, Ms. Wilson received a visit from a convicted felon named Calvin Baltimore. (JA 131).[4] Baltimore left a note offering to help her avoid foreclosure. (*Id.*).

Ms. Wilson met with Baltimore at her mother's house on September 30, 2003. He promised her that she could save her home from foreclosure if she signed a document labeled an "Agreement to S[ell] Real Estate" and other related documents, under which she would make monthly payments to Vincent Abell. Baltimore promised to assist her in obtaining a new loan to cover the mortgage and the loan from Abell. (*Id.*).

The following day, October 1, 2003, Baltimore picked Ms. Wilson up and drove her to the offices of Houlon & Berman, a law firm closely associated with Vincent Abell.[5] There, Ms. Wilson repeatedly told both Baltimore and Abell that she did not

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[4] Sandra Fleishman, From Foreclosure to the Cleaners, Washington Post, A1 (Dec. 25, 2004).

[5] Houlon & Berman was also the closing attorney for several other similar transactions that are the subject of a civil action on behalf of elderly homeowners. *See*

Footnote cont'd

want to sell her property. (JA 132). Ms. Wilson executed various documents without having an opportunity to review or understand them. She did not execute a deed in favor of Abell before a notary public. (JA 121).

The "Agreement to Sell Real Estate" (JA 59-61) cryptically describes the "purchase price" as "1st trust balance/foreclosure cost/$5,000 cash out," (JA 59) and indicates that it is to be paid by a $50,000 deposit to a Houlon & Berman trust account. (*Id.*). Abell paid Ms. Wilson $5000 in cash to meet her immediate debts (other than the mortgage). (JA 132). In return, Ms. Wilson agreed to a "rent" of $2100/month, of which only $1800 was to be paid to Modern Management each month. (JA 61). According to the "Agreement to Sell Real Estate," the balance of $300/month was to be paid later, as part of the agreed amount to repurchase the property at the end of a year. (*Id.*). The contract for sale gave Ms. Wilson the right to purchase the property (or to sell the property to a third party) for $280,000 and the $5000 she received from Abell, and the accumulated $300/month "back payments." (*Id.*). If she was late with two monthly payments, she lost the right to purchase. (*Id.*). A separate "lease" with Modern Management included the same deferred rent and repurchase provisions. (JA 73).[7] The

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Footnote cont'd

Verified Complaint, *Bilaal v. Abell*, No. 04-CA-7225 (D.C. Super. Ct., filed Sept. 22, 2004).

[7] It is conceded that Abell is the sole owner of the plaintiff, Modern Management Co. (Abell Dec. ¶ 1, JA 100). Modern Management's lease of premises belonging to Abell and the interlocking lease and sales contract establish that the company is his alter ego. Also, the check issued to Houlon & Berman for the "purchase" of Ms. Wilson's property is from Modern Management Co., not Abell personally. (JA 62).

HUD-1 closing statement indicated that Abell was taking the property "subject to" an existing loan of $194,273.10. (JA 63).[8] Abell never told the mortgage company about this agreement and never obtained its consent to assume Ms. Wilson's mortgage, leaving Ms. Wilson obligated under the promissory note.[9]

Ms. Wilson's understanding of the transaction was that the purported "sale" was not a real transfer of her title, but a necessary fiction so that Abell and Baltimore could stave off foreclosure. (JA 132). Abell was to pay off the foreclosure amount and make the monthly payments on Ms. Wilson's mortgage (*id.*) until she could get other financing for the property based on its rough current fair market value. Ms. Wilson understood that her monthly $1800 payments to Abell would begin in December 2003. (JA 133).

Ms. Wilson did not agree to sell property appraised at $265,000 for a tiny fraction of its value. The deal was bad enough as a loan. Ms. Wilson agreed to a stiff price to (she thought) keep her property out of foreclosure. At the end of a year, she would have paid Abell a markup of $80,000 over the nominal sales price of $199, 273.10 (including the $5000 "cash out"), *plus* $21,600 in monthly rent, *plus* $3600 in deferred rent, *plus* repayment of the $5000 in cash paid to Ms. Wilson at closing. Thus, a year's protection from foreclosure would cost $110,200, or an effective annual interest rate of over 51% (net after paying the mortgage) based on a nominal principal amount of $199,273.10.

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[8] The HUD-1 closing form also reflects a $5000 "finders fee" to Baltimore. (JA 64).

[9] The mortgage company's agreement is required before a purchaser's "assumption" of a mortgagee discharges the mortgagor of primary liability. Otherwise, the mortgator remains principally liable on the debt and the purchaser becomes "an additional promisor only." *Yasuna v. Miller*, 399 A.2d 68, 73-74 (D.C. 1979). Even when the mortgage company agrees to the assumption, the mortgagor remains liable as a surety. *Id.*

From Abell's perspective, he had much to gain and nothing to lose from the deal. In the unexpected event that Ms. Wilson paid all of the "rent," on time and was able to exercise her right to repurchase, the mortgage securing the property would be paid each month without his taking on any debt. Abell would net over $100,000 for lending Ms. Wilson money to stop the foreclosure for a year. He would reap this return after putting up only about $66,000 to stop foreclosure and to pay settlement costs (including Baltimore's $5000 fee). (JA 64). If, on the other hand, Ms. Wilson failed to repurchase, or if she lost her right to repurchase by making late rent payments, (JA 73), Abell would have property worth much more than the mortgage balance. And, unlike a bank that foreclosed, he would be under no obligation to pay the excess to Ms. Wilson.

Ms. Wilson soon learned that Abell had not paid her mortgage, and that she was again at risk of foreclosure. (JA 34-35). She stopped payment on the first check due to Abell, and instead made a direct payment to the mortgage company. (JA 133).

D. The Eviction Action.

On December 3, 2003, Modern Management sued Ms. Wilson in landlord tenant court for possession of the property and $4220 in rent for October and November and late fees. (JA 27). The complaint does not specify any lease terms. The lease is not attached. Nor is the sales contract or the deed purporting to transfer ownership from Ms. Wilson to Abell. (*Id.*). The complaint alleged that Ms. Wilson owed $2100 per month in back rent (not $1800 as set forth in the lease and sales agreement). Ms. Wilson filed a pro se answer on January 5, 2004. (JA 28).

On February 11, 2004, Ms. Wilson appeared with counsel before the Hon. Brooke Hedge. From the beginning, Ms. Wilson advised the court that the validity of the

existence of a landlord tenant relationship was contested. (JA 33, 35). Judge Hedge granted Ms. Wilson leave to appear *in forma pauperis*. As a result of that inquiry, Judge Hedge was aware that Ms. Wilson was disabled and unemployed. (JA 29). Her counsel explained that Ms. Wilson "will be getting disability income but it hasn't come in yet." (JA 34-35). The court granted Ms. Wilson additional time to file an amended answer through counsel.

Modern Management requested a protective order. (JA 34). Ms. Wilson opposed the request, explaining that she had been paying her mortgage directly to the mortgage company after learning that Abell had failed to do so and that she was again facing foreclosure. (JA 34-35). Attempting to understand why there was a dispute over title, Judge Hedge asked, "[i]s she a foreclosed tenant?" (JA 36), meaning a tenant of a previous owner who had lost the property through foreclosure. Instead of forthrightly responding "no," the landlord's counsel dodged the question, describing Ms. Wilson as a tenant who "obviously wouldn't sign a lease agreement to pay rent to someone else." (*Id.*). Accepting the representation that Ms. Wilson was obligated on the mortgage, Judge Hedge indicated that she was "inclined to set a protective order and that Ms. Wilson can notify the mortgage company that that's where the money is and they can come and seek to gather that money." (*Id.*; *see* JA 37). She entered an order requiring Ms. Wilson to pay $1569 per month into the registry of the Court (JA 39).

Faced with the continuing threat of foreclosure, Ms. Wilson made mortgage payments, but failed to make the protective order payments due in February 2004. On March 8, 2004, Modern Management moved to strike pleadings and enter judgment for plaintiff. (JA 42).

On March 16, 2004. Ms. Wilson filed an affidavit in support of her application for a waiver of undertaking. She averred that she was unemployed and received $340 per month in interim disability payments and $1500 per month in rent. (JA 43). She explained that she was living with her mother, rather than at the Taylor Street property because of her medical condition. (*Id.*). Modern Management opposed the request to waive undertaking in a lengthy pleading admitting that Abell had not paid off the mortgage in Ms. Wilson's name and had not made payments to keep the mortgage current. (JA 46, 52 n.2).[10]

On April 16, 2004, Judge Campbell held a hearing on the motion to strike pleadings and enter judgment. Modern Management argued that Ms. Wilson owed $2200 even after credit for the payments she made to the mortgage company. Ms. Wilson requested additional time to make the payments. (JA 78). Judge Campbell declined to impose the "ultimate sanction" of striking Ms. Wilson's pleadings and entering judgment. Instead, he chose to impose the lesser sanction of striking her plea of title. (*Id.*). Judge Campell recognized that "Ms. Wilson can in effect defend the possessory action on similar grounds by saying there is no lease, which I think is one aspect of her defense, namely that this was all concocted and there really isn't a lease, and therefore she doesn't owe rental payments. *So, I think she will be able to defend on the merits*. But I'm going to strike the plea of title." (JA 79) (emphasis added).

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[10] As of March 16, 2004, the outstanding balance of Ms. Wilson's mortgage (for which she remained obligated) was $149,866.79. The full payoff amount was $158,898.34. On April 7, 2004, Abell recorded a new deed of trust in favor of Access National Bank dated April 1, 2004, to secure a loan of $200,000. Modern Management paid off Ms. Wilson's mortgage on April 2, 2004, with a check drawn on a Houlon & Berman escrow account.

Proceeding pro se after her counsel withdrew, Ms. Wilson moved for reconsideration of Judge Campbell's order. On May 10, 2004, Judge Campbell entered an order granting partial relief, and directing Modern Management to account for all monies paid by Ms. Wilson either to the court registry or directly to the mortgage company. (JA 83). Modern Management moved again to strike pleadings and enter judgment. (JA 85). Ms. Wilson was eventually able to bring her protective order payments current through June, but did not make payments due July 5 and August 5. (JA 141). Modern Management thereafter filed a third motion to strike pleadings and filed a motion for summary judgment. On August 9, 2004 Ms. Wilson filed a verified amended answer and counterclaims. (JA 126-138). She alleged as a defense that Abell's deed was void or voidable, and asserted counterclaims for fraud, unlawful trade practice and unconscionability, to quiet title and for trespass damages. At the same time, she filed an opposition to the motion for summary judgment with a supporting affidavit. (JA 117-125).

The motions were heard on August 25, 2004, before Judge Hedge. Notwithstanding Judge Campbell's expectation that Ms. Wilson could still defend on the merits, Judge Hedge ruled that Ms. Wilson had no valid defenses remaining in light of Judge Campbell's prior ruling striking the plea of title defense. (JA 147). With that understanding, the Court granted Modern Management judgment for possession. Judge Hedge ruled as follows:

> As I said, you do, you can pursue your claims that you have in your answer, but you have to go to Landlord, you have to go to Civil Claims Action to do that. And its, it wasn't a proper, the allegations you make in your counterclaims are those related to your plea of title, which was struck; and those are not, putting aside the plea of title, the claims of fraud that you have are not ones that can be placed against a suit for possession

> even on the merits. So that you can still raise those, you just convert what you have in your counterclaims to a complaint. And you file it in the Civil Actions Branch.
>
> But in light of those missed protective order payments and finding that it, that no payments have been made as required since June, the Court grants judgment for possession. And you'll have to go to Civil Actions to file your complaint against the landlord for fraud and title claims.

(JA 152). Thus, with the understanding that Judge Campbell's earlier ruling had already stripped Ms. Wilson of all viable defenses to eviction, the Court entered judgment as a sanction for missed protective order payments.[11] Ms. Wilson noted an appeal from the judgment on August 25, 2004. (JA 21).

The Court issued a writ of restitution on September 8, 2004. (JA 154). Ms. Wilson sought a stay and moved for reconsideration of the order granting possession to Modern Management Co. On October 6, while the motion for reconsideration was pending, marshals carried out the eviction. (JA 18 (docket entry)). The motion to stay was denied as moot on October 8. (*Id.*). On January 7, 2005, Judge Hedge denied the motion to reconsider. In this order, without benefit of the transcript of her ruling, she explained that the court "did not base its decision on the merits of the claim or make any ruling on the issue of plea of title or fraud. Rather the ruling was based on defendant['s continued failure to comply with the order requiring protective order payments." (JA 25). Ms. Wilson noted an appeal from the denial of the motion to reconsider on January 28, 2005. (JA 22). This Court, *sua sponte*, consolidated the appeals.

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[11] Ms. Wilson, then pro se, filed a civil action on September 23, 2004. *See* Complaint, *Wilson v. Abell*, No. 04-7270 (D.C. Super. Ct.). Ms. Wilson is now represented in that matter by Hogan & Hartson.

SUMMARY OF THE ARGUMENT

The decision below awarding possession to Modern Management without considering the defenses of fraud and unconscionability conflicts with this Court's strong preference for adjudication on the merits, not by default. Judge Hedge's ruling was an abuse of discretion because it rested on a legal error – the erroneous conclusion that Ms. Wilson had (and could assert) no legally viable defenses to an action for possession. It was also an abuse of discretion because the factual foundation for the ruling was infirm. Judge Hedge concluded that an earlier ruling by another judge striking Ms. Wilson's plea of title also swept away her fraud and unconscionability defenses to the enforcement of a purported lease. But in fact, the earlier ruling was narrow, and intentionally preserved Ms. Wilson's ability to defend against eviction on the merits. Stripped of its legally and factually defective elements, the decision to award possession to Modern Management as a sanction for non-payment of a protective order cannot stand.

The result of the proceedings below was profoundly unfair, and therefore inconsistent with the exercise of the superior court's equitable powers to impose protective orders in landlord tenant cases and to impose sanctions for violating those orders. Modern Management's complaint for possession was indistinguishable from an ordinary action for non-payment of rent. But the resemblance stopped there. In an ordinary case, the court has discretion to impose a protective order if necessary to protect the landlord's interest (and the interest of other tenants) in maintaining a stream of income while disputes about the amount of rent properly due are resolved. The dispute in this case, from the very beginning, concerned the validity of the lease, the existence of a landlord tenant relationship, and the existence of an obligation to pay Modern

Management anything to retain possession. The undisputed fact that Ms. Wilson, not Modern Management, was obligated on the mortgage when the complaint was filed and the initial hearing was held – a fact inconsistent with the tenancy alleged in the complaint – precluded the Court from taking the complaint at face value and imposing a protective order and from stripping Ms. Wilson of her defenses as a sanction. The Superior Court's equitable powers should not be used, as they were here, to award possession of a home to the perpetrator of a fraud.

ARGUMENT

THE ENTRY OF JUDGMENT WAS BASED ON A FACTUAL ERROR ABOUT THE SCOPE OF A PRIOR RULING AND A LEGAL ERROR ABOUT THE VALIDITY OF MS. WILSON'S DEFENSES TO EVICTION; IT WAS THEREFORE AN ABUSE OF DISCRETION

The trial judge entered judgment for Modern Management without considering the merits of Ms. Wilson's defenses that the entire transaction in which she purportedly conveyed title and entered into a lease for her own property was fraudulent and unconscionable and should be set aside. That decision was infected by factual and legal errors, and was therefore an abuse of the trial court's discretion. *See generally Johnson v. United States*, 398 A.2d 354, 365-67 (D.C. 1979).

A. Standard of Review.

This Court has held that a judgment of possession can be entered as a sanction for a tenant's failure to make timely protective order payments. *Taylor v. First American Title Co.*, 477 A.2d 227, 230 (D.C. 1984); *Battle v. Nash*, 470 A.2d 1252 (D.C. 1983); *Davis v. Rental Assoc., Inc.*, 456 A.2d 820, 826 (D.C. 1983) (en banc); *Mahdi v. Poretsky Mgmt., Inc.*, 433 A.2d 1085, 1086 (D.C. 1981). Because the entry of a judgment of possession resolves a case without reaching the merits, "the sanction should be used

sparingly" and limited to willful conduct, just as the Court requires for dismissal under SCR-Rule 41(b). *See Smith v. Fairfax Village Cond. VIII Bd. of Directors*, 775 A.2d 1085, 1094 (D.C. 2001) (discussing standard in context of dismissal of complaint challenging wrongful foreclosure and entering a default judgment for possession); *Abell v. Wang*, 697 A.2d 796, 802-03 (D.C. 1997) (reversing discovery sanction that inevitably led to judgment against Abell because, among other things, of the trial court's failure to determine whether his sanctioned conduct was willful).[12] *Cf., e.g., Lofton v. Kator & Scott, Chtd.*, 802 A.2d 955, 958 (D.C. 2002) (reversing dismissal with prejudice); *Redman v. Kelly*, 795 A.2d 684, 687 (D.C. 2002); *Dada v. Children's National Medical Center*, 763 A.2d 1113, 1115 n.7 (D.C. 2000); *Croley v. RNC*, 759 A.2d 682, 698 (D.C. 2000).

"It is well recognized, of course, that [a trial] court by definition abuses its discretion when it makes an error of law." *Amantangelo v. Schultz*, 870 A.2d 548, 554 (D.C. 2005) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)). *See Allen v. Yates*, 870 A.2d 39, 50 (D.C. 2005) (quoting *In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991)); *Thomas v. United States*, 824 A.2d 26, 31 (D.C. 2003); *D.C. v. Davis*, 811 A.2d 800, 804 (D.C. 2002); *Allstate Ins. Co. v. Ramos,*, 782 A.2d 280, 285-86 (D.C. 2001); *In re Ko. W.*, 774 A.2d 296, 303 (D.C. 2001). Consistent with that general rule, the imposition of a sanction is an abuse of discretion when it is based on an error of law. *Benn v. United States*, 801 A.2d 132, 143 (D.C. 2002); *see Yoon v. United States,* 594 A.2d 1056, 1061 (D.C. 1991) (applying same principle to decision not to impose a sanction). In this case,

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[12] If anything, the standard should be more favorable to a defendant who has been brought before the court involuntarily, than to a plaintiff who has invoked the court's jurisdiction.

one of the legal premises of the court's decision to enter judgment as a sanction was the erroneous conclusion that Ms. Wilson did not have or had not presented viable defenses to Modern Management's suit for possession.

The exercise of discretion also requires "a firm factual foundation." *Howard University v. Lacy*, 818 A.2d 733, 736-37 (D.C. 2003) (court abused its discretion in applying offensive collateral estoppel based on a misunderstanding of the facts); *In re Orshansky*, 804 A.2d 1077, 1092 (D.C. 2002) (reversing appointment of guardian when, *inter alia*, trial court disregarded testimony about the incapacitated person's wishes). The imposition of a sanction is likewise an abuse of discretion when it is based on a factual error. *In re Bolden*, 719 A.2d 1253, 1255 (D.C. 1998) (reversing imposition of sanction because factual foundation was "lacking for the judge's conclusion that Bolden acted in bad faith"). Part of the "factual foundation" for the trial court's ruling was the erroneous understanding that Judge Campbell's prior decision striking the plea of title left nothing to be decided.

B. The Trial Judge Erred in Concluding that Ms. Wilson Did Not Have Viable Defenses to Modern Management's Possessory Claim.

Ms. Wilson's pro se verified answer alleged facts that establish the defenses of fraud and unconscionability, although the defenses are referred to as counterclaims. (JA 126-138). As a defendant in a landlord tenant case is not required to plead defenses at all, SCR LT Rule 5(a), and the answer provided unequivocal notice of the factual basis on which Ms. Wilson disputed the claim for possession, those defenses were before the court for purposes of determining whether to enter judgment, and should have been considered. *Barton v. District of Columbia*, 817 A.2d 834, 841 (D.C. 2003) ("a defendant always has the right to present any *legal* defense as part of a general denial of

liability.") (citation omitted; emphasis in *Barton*). The trial court's ruling was not, in any event, based on a technical pleading error, but on the proposition that the facts alleged did not give rise to defenses in a possessory action: "the defenses that you were raising are not ones in Landlord Tenant Court that can be raised against the suit for possession." (JA 147).

1. Ms. Wilson Presented a Valid Fraud Defense

Judge Hedge explicitly premised her ruling granting Modern Management possession on the proposition that, " the claims of fraud that [Ms. Wilson has interposed] are not ones that can be placed against a suit for possession even on the merits." (JA 152). That proposition is incorrect. Fraud in the inducement is a defense to any action to enforce a contract, including a lease. *Shin v. Portals Confederation Corp.*, 728 A.2d 615, 619 (D.C. 1999). *See Allstate Ins. Co. v. Ramos*, 782 A.2d at 287 (remanding for consideration of defense of fraud in the inducement); *Lofchie v. Washington Square Ltd. Partnership,* 580 A.2d 665, 668 & n.5 (D.C. 1990) (fraud in the inducement as defense). As Modern Management's complaint for possession was premised on the validity of an unenforceable lease, fraud in the inducement was a complete defense.

Ms. Wilson's verified answer described the meeting at which she purportedly transferred her property to Abell:

> Vincent Abell was introduced to Ms. Wilson as the person who would be lending her the money she needed to save her home. Vincent Abell and Mr. [Calvin] Baltimore both assured Ms. Wilson that any documents of transfer or lease that were placed before her for signature at the 'closing' were merely fictions necessary to save her home. She was, also, assured that her repayment date for the loan would not begin until December of 2003. Further, Ms. Wilson was falsely promised, by Vincent Abell and Mr. Baltimore, that her monthly mortgage payments would be made by Vincent Abell, through Modern Management Company, under a fictitious lease.

(JA 128); *see id.* ¶¶ 31-35 (JA 134-35); Opposition to Motion for Summary Judgment, ¶ 3 (JA 118-120); Affidavit of Maria T. Wilson, ¶ 3 (JA 121-22). Thus, the record before the trial court included a defense that Abell and Modern Management had obtained the lease and deed by fraud or misrepresentation. *See* 2 Dobbs, Law of Remedies § 9.1, at 542 (2d ed. 1993). As Judge Campbell recognized in his ruling striking the plea of title defense, Ms. Wilson could defend against the alleged breach of her obligation to pay rent under the October 1 lease "by saying there is no lease" because of the fraud. (JA 79)

Fraud is also an available defense to an action for possession because, upon finding fraud, the court had the power to impose a constructive trust on the property, *see* 2 Dobbs, Law of Remedies § 9.3, at 595, precluding Modern Management from evicting Ms. Wilson without affecting record title. As constructive trustee for Ms. Wilson, Modern Management could not evict her.

Many years ago, the United States Court of Appeals for the D.C. Circuit considered a foreclosure rescue scam in *Mandley v. Backer*, 73 U.S.App.D.C. 412, 121 F.2d 875 (1941). The court applied the "settled rule that if a person acquires title to lands by means of an intentionally false and fraudulent verbal promised either to hold the same for a specified purpose or to convey or reconvey to a designated individual, and having thus fraudulently obtained title, retains the property as his own, equity will regard such person as holding the property charged with a constructive trust and will compel him to fulfill the trust by conveying according to his engagement." *Id.* at 876. The court reversed the dismissal of a complaint challenging the conveyance of the property and seeking equitable relief. *See FTC v. Capitol City Mortgage Corp.*, 321 F.Supp.2d 16, 19

(D.D.C. 2004) (denying motion to dismiss constructive trust claim against predatory lender).[13]

2. **Ms. Wilson Presented a Valid Unconscionability Defense**

Judge Hedge also erroneously disregarded the unconscionability defense presented in Ms. Wilson's pro se papers in concluding that she had not presented a viable defense to the complaint for possession. (JA 135-136, ¶¶ 36-39). The District of Columbia Consumer Protection Procedures Act (DCCPA) makes it unlawful to "make or *enforce* unconscionable terms or provisions of sales or *leases*." D.C. Code § 28-3904(r)

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[13] A constructive trust is an appropriate remedy when a person conveys a deed with a misunderstanding (as here) of how the recipient of the deed will use the property. In *Osin v. Johnson*, 100 U.S. App. D.C. 230, 243 F.2d 653 (1957), the court of appeals concluded that a woman who had executed and delivered a deed on the fraudulent representation that that the purchaser would record a deed of trust in her favor, was entitled to seek to impose a constructive trust on the property.

> A constructive trust is a purely equitable device which can be applied with great flexibility. It arises by operation of law from the occurrence of an unconscionable act for which no traditional relief is available. A constructive trust can be imposed whenever one unfairly holds title or a property interest and where the holder would be unjustly enriched if permitted to retain such interest. Specifically, the acquisition of property through the fraudulent misrepresentation of a material fact has been held to be sufficient grounds to fasten a constructive trust on the property.

Id. at 656. In *Hertz v. Klavan*, 374 A.2d 871 (D.C. 1977), this Court upheld as a constructive trust an order setting aside a deed that had been executed with the "intention * * * to convey the property to appellants only to enable them to manage it for her because of her ill health and hospitalization," not to permanently extinguish any interest in the property. The Court explained that, "[a] constructive trust is the formula through which the conscience of equity finds expression. When the property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him to a trustee." *Id.* at 873 (citation omitted). Actual fraud is not even required; a constructive trust may be imposed for "[i]nequitable conduct short of fraud." *Id.*

(emphasis added).[14] That prohibition applies to real estate transactions. D.C. Code § 28-3901(a)(7). *See DeBerry v. First Government Mortgage and Investors Corp.*, 743 A.2d 699, 701-02 (D.C. 1999) (DCCPA applies to real estate transactions); *Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1331 n.13 (D.C. 1995) (assuming applicability of DCCPA to mortgage refinance transaction).

"In the CCPA, the Council declared its opposition to unconscionable credit transactions exploiting a consumer's likely inability to make payment in full or otherwise protect her interests." *DeBerry*, 743 A.2d at 703. The CCPA is violated by an unconscionable and deceptive "real estate transaction" that is cloaked as a sale and leaseback every bit as much as by a mortgage refinance loan. *See generally Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. 1972) (considering whether waiver of

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[14] Section 28-3904(r) identifies certain of the factors to be considered in determining whether a term or provision is unconscionable:

> (1) knowledge by the person at the time credit sales are consummated that there was no reasonable probability of payment in full of the obligation by the consumer;
>
> (2) knowledge by the person at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;
>
> (3) gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in transactions by like buyers or lessees;
>
> (4) that the person contracted for or received separate charges for insurance with respect to credit sales with the effect of making the sales, considered as a whole, unconscionable; and
>
> (5) that the person has knowingly taken advantage of the inability of the consumer reasonably to protect his interests by reasons of age, physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement, or similar factors.

defense clause in contract was unenforceable as unconscionable under Maryland law); *Morris v. Capitol Furniture Co.*, 280 A.2d 775, 776 (D.C. 1971) (considering unconscionability claim under District of Columbia law); *Patterson v. Walker-Thomas Furniture Co.* 277 A.2d 111, 113-14 (D.C. 1971) (test for unconscionability under District of Columbia law).

The undisputed terms of Ms. Wilson's "lease" were unconscionable, precluding a judgment of possession based on the enforcement of the lease. The transaction, as presented to her, was a way of refinancing her property and avoiding foreclosure. Instead of an ordinary mortgage that gives the mortgagee a "qualified fee simple," *DeBerry*, 743 A.2d at 702, Ms. Wilson unwittingly became a participant in a deceptive "real estate transaction" within the meaning of the DCCPA that was structured to charge her more than $100,000 for paying the mortgagee to cure the default and for letting her continue to possess the property for a year until she could "repurchase" her title (yet leaving her obligated on the mortgage).

C. Ms. Wilson's Defenses Were Not Foreclosed By Judge Campbell's Order Striking Her Plea of Title.

Judge Hedge's ruling may also have been premised on a misunderstanding of the scope of Judge Campbell's prior order striking Ms. Wilson's "plea of title" defense. Judge Hedge referred to the allegations in Ms. Wilson's answer as "those that are related to your plea of title, which was struck." (JA 152). Modern Management argued in its motion for summary judgment that the order striking the plea of title defense reduced the case to a simple question of whether Ms. Wilson had paid the rent called for in the lease agreement, regardless of the circumstances in which the lease, deed, and sales agreement were executed. As shown in the preceding section, that proposition is legally erroneous.

Ms. Wilson had viable defenses to Modern Management's claim for possession based on a fraudulent and unconscionable transaction. Nor did the order striking the plea of title defense strip Ms. Wilson of those other defenses, which did not challenge Modern Management's *record* title.

"The distinction between title to and possession of property, of course, was well recognized at common law." *Pernell v. Southall Realty*, 416 U.S. 363, 371 & n. 5 (1974) (citing *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133 (1915)).[15] Striking a plea of title does not affect any other legal or equitable defenses to possession. As Judge Campbell explained, notwithstanding the order striking the plea of title defense, "Ms. Wilson can in effect defend the possessory action on similar grounds by saying there is no lease, which

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[15] The plea of title defense has a unique status under District of Columbia law. *See Pernell v. Southall Realty*, 416 U.S. at 370-71 & n. 5 (1974). That is a legacy of the division of jurisdiction between the old District of Columbia Court of General Sessions and the United States District Court before the 1970 Court Reform and Reorganization Act. Under the law before 1970, the local court had "no jurisdiction to try title to real estate." *Thompson v. Mazo*, 245 A.2d 122, 123 (D.C. 1968); *Zabarah v. Yemen Arab Republic*, 198 A.2d 906, 907 (D.C. 1964). When questions of title arose in landlord tenant proceedings within the general sessions court's jurisdiction, Congress provided a mechanism to transfer the case to the district court upon the posting of an undertaking. *Thompson v. Mazo*, 245 A.2d at 123. (quoting former D.C. Code § 16-1504); *Zabarah v. Yemen Arab Republic*, 198 A.2d at 908 n.2 (quoting former D.C. Code § 11-738). Both the limitations on local court jurisdiction and the transfer statute were repealed in 1970, and there is no longer any statutory basis or jurisdictional rationale for treating a "plea of title" differently from any other defense in a landlord tenant proceeding. *See* D.C. Code § 11-921(a)(3)(A).

Today, instead of a jurisdictional statute, the special requirements for a plea of title defense are based solely on a court rule that persisted despite the wholesale reorganization of the District of Columbia's court system. *See* Super. Ct. L & T R 5(c). A superior court judge assigned to the civil division has the same statutory authority and jurisdiction whether assigned to the landlord tenant branch or the civil actions branch. *Williams v. Dudley Trust Foundation*, 675 A.2d 45, 54 (D.C. 1996); D.C. Code § 11-902(a) (superior court shall consist of five listed divisions), 11-902(b) (court may divide divisions into branches by rule).

I think is one aspect of her defense, namely that this was all concocted and there really isn't a lease and therefore she doesn't owe rent payments." (JA 79).

Modern Management was not entitled to evict Ms. Wilson for breaching an invalid lease for reasons independent of the question of title. As shown in the preceding sections, Modern Management's and Abell's fraud was a defense to the enforcement of a "lease." The lease was also unenforceable because its terms were unconscionable. Moreover, as constructive trustee for Ms. Wilson, Modern Management and Abell could not evict her from property held for her benefit.

A constructive trust is not an attack on legal title, such that Ms. Wilson was implicitly foreclosed from defending the eviction action by Judge Campbell's ruling striking her plea of title defense. Rather, a constructive trust prevents the holder of legal title from profiting unjustly, "[w]henever the legal title to property is obtained through means or under circumstances 'which render it unsconscientious for the holder of the legal title to retain and enjoy the beneficial interest.'" *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (quoting *Moore v. Crawford*, 130 U.S. 122, 128 (1889)). *See Hertz v. Klavan*, 374 A.2d at 873 (constructive trust does not alter record ownership). When Judge Campbell struck Ms. Wilson's plea of title, therefore, he did not strip her of the fraud and unconscionability defenses she pleaded in her pro se opposition to the summary judgment motion and her verified answer.

D. The Judgment Should Be Reversed.

The Court should reverse the judgment of possession and remand for a determination of the merits of Ms. Wilson's defenses. When the court's legal and factual error are removed from the calculus, there is no basis for entering judgment in favor of Modern Management without considering Ms. Wilson's defenses on their merits.

This Court has a strong preference for deciding cases on the merits. *See, e.g., Johnson v. Payless Shoe Source*, 841 A.2d 1249, 1258 (D.C. 2004) ("general preference for trial on the merits"); *Lester v. District of Columbia*, 806 A.2d 206, 208 (D.C. 2002) ("strong presumption favoring adjudication on the merits"). That preference applies with even greater force when a judgment is entered against a defendant than when a plaintiff's case is dismissed for failing to satisfy the procedural requirements of a forum the plaintiff has chosen. *See Mourning v. APCOA Standard Parking, Inc.*, 828 A.2d 165, 167 (D.C. 2003) ("because there is a general preference for trial on the merits, this court gives close scrutiny to the denial of a Rule 60(b) motion seeking relief from a default judgment"); *Chappelle v. Alaska Seaboard Partners, L.P.*, 818 A.2d 972, 973 (D.C. 2003) ("strong judicial policy favors deciding cases on their merits rather than by default judgment"); *Capital One Bank v. Taylor*, 2005 WL 1692632, *2 (D.C. Super. Ct. 2005) (vacating default judgment entered against credit card debtor in small claims branch). Like a default judgment entered when a party fails to defend, a judgment entered as a sanction for failing to pay a protective order allows a plaintiff to win a case even if its claims have no merit.

Ms. Wilson asserted valid defenses to eviction supported by a verified answer and an affidavit in opposition to Modern Management's motion for summary judgment.

While Ms. Wilson's pleadings were filed pro se, and are neither as pointed nor as polished as those filed by counsel for Modern Management, they clearly set forth reasons why the purported lease should not be enforced. She did her best as a pro se litigant to plead facts and submit documents in support of her defenses. And, the record shows that she made diligent albeit unsuccessful efforts to secure the assistance of counsel after the lawyer she retained withdrew.

The terms of the sale and leaseback transaction were abusive and unconscionable on their face, and the undisputed evidence raised obvious questions about the legitimacy of the deal. Those considerations should have precluded the court from entering judgment for the putative landlord.[17] For example, two undisputed facts -- (1) Ms. Wilson, although no longer the owner of record, was still obligated on a mortgage, and (2) Abell had not communicated his ownership interest to the mortgage company -- established that this was not an ordinary property sale. The "lease" also gave Ms. Wilson the right to sell the property to a third party, as long as she agreed to give $285,000 of the

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[17] Although Ms. Wilson's pro se answer did not in so many words assert the "unclean hands" doctrine as a bar to equitable relief, the facts averred in her verified answer involve "misconduct by the plaintiff *in the same transaction* that is the subject of his claim." *Feaster v. Vance*, 832 A.2d 1277, 1289 (D.C. 2003) (internal quotation and citation omitted; emphasis added by the Court). The entry of judgment for non-payment of a protective order is equitable relief subject to equitable defenses. *Davis v. Rental Assocs.*, 456 A.2d at 827 (sanction is an exercise of the court's equity power). *See Gorsuch Homes v. Wooten*, 597 N.E.2d 554 (Oh. Ct. App. 1992) (writ of restitution is subject to equitable defenses); *Williams v. Masterson*, 306 S.W. 2d 152, 157 (Tenn. Ct. App. 1957) (writ of restitution is an equitable remedy). Indeed, the entry of a protective order itself is an equitable remedy that should be withheld when the party seeking the protective order has unclean hands. *See Dameron v. Capitol House Assoc. Ltd. Partnership*, 431 A.2d 580, 583 (D.C. 1981) (describing protective order as "an equitable tool of the court").

proceeds (plus the accrued "deferred rent") to Abell, a prerogative of continued ownership that would be unusual for a residential tenant.

Judge Hedge accepted Modern Management's contention that the entry of judgment was simply a formality because Ms. Wilson did not have a viable defense to eviction and because her allegations were part and parcel of the stricken plea of title defense. Although Judge Hedge declined to give Ms. Wilson more time to find an attorney to assist her or to make the protective order payments, she did not find that Ms. Wilson's conduct was willful or deliberate. Nor could such a finding have been made in light of Ms. Wilson's disability and financial straits, including the "deed" which precluded her from using the equity in the home.

Nor was Modern Management unfairly prejudiced by Ms. Wilson's failure to make timely protective order payments. On its face, the lease contemplates a repurchase by Ms. Wilson at a premium, not long-term use of the property to generate rental income. Unlike the usual case in which the court requires a tenant to pay full or reduced rent into the court registry pending a final resolution of a landlord tenant dispute, the protective order in this case also was based on the monthly mortgage payment, an amount owed not to Abell or Modern Management, but to a third party: "[T]he mortgage company can be notified and they can come seek the release of the funds." Thus, the protective order was intended as security for the mortgagor, not Modern Management. There was no danger that Modern Management would be "deprived of funds which [it] may well need to pay [the] mortgage, to maintain other tenants' apartments and for other appropriate purposes." *Davis,* 456 A.2d 826 n.7, since it was Ms. Wilson, not Modern Management, who was obligated to make the mortgage payments, and had the responsibility for

maintaining the property. Any risk of harm to Abell (rather than Modern Management) if the bank tried to foreclose on property to which Abell had recorded title was self-inflicted when Abell and Modern Management left the mortgage and the obligation to repay it in Ms. Wilson's name.

Ms. Wilson advised the court from the beginning that the dispute in this case concerned the validity of the purported landlord tenant relationship. (JA 33, 35). The issue to be decided was the validity and enforceability of a purported lease executed in conjunction with a disputed deed and sales agreement. Modern Management's status as "landlord" therefore depended on whether there had been a genuine transfer of ownership, or whether the transaction was – as represented to Ms. Wilson – really a form of loan to stave off a foreclosure. Modern Management did not show "an obvious need for such protection," in this case. *Bell v. Tsintolas Realty Co.,* 430 F.2d 464, 484 (D.C. Cr. 1970). Even on its own account of the transaction, Modern Management was amply secured against any financial harm from non-payment of the protective order, having purportedly acquired title to the property for far less than its value. Certainly there was no legitimate concern that Modern Management would face "confiscation of private property." *Davis v. Rental Associates, Inc.*, 456 A.2d at 826.

Ultimately, the touchstone is equity, because the protective order is a form of pendente lite injunction premised on certain rights that a plaintiff in a landlord tenant case ordinarily has against a tenant. The court should have approached the question of sanctions very differently in this case, where there was a clear and bona fide dispute over ownership and the validity of the very lease Modern Management was purporting to enforce. While this Court has cautioned, *Davis*, 456 A.2d at 826, that the decision

whether to impose sanctions does not require reconsideration of the protective order, *Davis* did not involve a dispute over the existence of a landlord tenant relationship. In this case, and in others like it, the entry of a judgment of possession without deciding whether there is a landlord tenant relationship at all, is fundamentally unfair.

Here, Abell and Modern Management successfully exploited the practice of routinely imposing protective orders and entering judgment as a sanction for non-payment to complete the process of stripping Ms. Wilson's equity. If Abell had (as Ms. Wilson thought) agreed to lend her enough money to cure the mortgage default (even on onerous terms) and then foreclosed for non-payment, he would have been required to pay her the "equity of redemption," the excess over the sale of the property in foreclosure. Eviction for non-payment of "rent" avoids the obligation of a mortgage trustee to preserve the equity of redemption for the mortgagor. *Cf.* D.C. Code § 42-817 (allowing creditor that purchases property sold in foreclosure to deduct the debt from the amount paid to the mortgage trustee). That is an inequitable result, inconsistent with the principles of fairness that must guide the invocation of the court's equitable powers.

CONCLUSION

The judgment awarding Modern Management Co. possession should be reversed, and the case remanded with instructions to decide the merits of Ms. Wilson's defenses.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Appellant and a copy of the Appendix were served by first class mail, postage prepaid, to Michael E. Brand, Loewinger & Brand, PLLC, 471 H Street, N.W., Washington, D.C. 20001, this 11th day of October, 2005.

David Reiser