No. 03-CV-1373

DISTRICT OF COLUMBIA COURT OF APPEALS

DAVID NUYEN,

Appellant

v.

REYSA LUNA,

Appellee

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

BRIEF OF APPELLEE

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

The parties to the case are appellee Reysa Luna, the defendant below, and appellant David Nuyen, the plaintiff below.

In the superior court, Ms. Luna was represented by Dev A. Kayal. She is represented in this Court by Barbara McDowell and Jennifer Berger of The Legal Aid Society of the District of Columbia.

In the superior court, Mr. Nuyen represented himself in this case pro se and through Daniel Wemhoff. He is represented in this Court by Mr. Wemhoff. He was represented in a consolidated case, Superior Court Case No. 01-CA-8500, by Joseph F. Cunningham, Robert A. Battey, Geoffrey M. Bohn, and Allen G. Siegel.

No intervenors or amici appeared in the superior court.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the superior court abused its discretion in denying a motion under Rule 60(b) of the Rules of Civil Procedure to vacate a default judgment.

2. Whether appellant's challenge to the underlying default judgment is properly before this Court and, if so, whether the default judgment comports with Rule 42 of the Rules of Civil Procedure, the "law of the case" doctrine, res judicata, and due process.

STATEMENT OF THE CASE

This appeal challenges the superior court's denial of a motion under Rule 60(b) of the Rules of Civil Procedure to vacate a default judgment entered against a landlord in his suit for possession of an apartment and unpaid rent. After the landlord did not appear personally or through counsel at a pretrial conference, the tenant moved for entry of a default judgment, both on the landlord's claims and on the tenant's counterclaims based on uncorrected housing code violations. Although the landlord was served with the default judgment motion and admits to having timely received it, he did not file any response during the six months that the motion remained pending. The superior court ultimately granted the motion as "unopposed." Several weeks later, the landlord filed a motion to vacate the default judgment, which the superior court denied without opinion. The landlord appealed the order denying the motion to vacate, but did not appeal the order granting the default judgment.

STATEMENT OF FACTS

1. The parties. At the time that this case was filed in October 2001, plaintiff-appellant David Nuyen owned and managed approximately 15 low-income apartment buildings in the District of Columbia and suburban Maryland. He had recently entered into a settlement with the District of Columbia, which had charged him with 2,283 housing code violations at two of those

buildings. Even more recently, he had pleaded guilty to federal felony charges arising out of his attempts to conceal his failure to give his tenants statutorily required warnings about lead paint. He was awaiting sentencing on those charges. (He was later sentenced to two years in prison.)[1]

By October 2001, defendant-appellee Raysa Luna and her two minor daughters had been living for a year in Mr. Nuyen's building at 5611 Fifth Street, N.W. Throughout her tenancy, Ms. Luna had complained to Mr. Nuyen about unsafe and unsanitary conditions in her apartment, including inadequate heat, malfunctioning plumbing, rodent and insect infestation, missing fire alarms, and a deteriorating ceiling. Mr. Nuyen had failed to correct those conditions. In April 2001, the ceiling collapsed on Ms. Luna's elder daughter, Reyna Gomez, who was taken by ambulance to a hospital to receive treatment for injuries to her spine. After that incident, the Fire Department required Ms. Luna and her family to vacate the apartment temporarily. [2]

2. The present suit. On October 2, 2001, Mr. Nuyen, doing business as USA Home Champion Realty, filed this suit pro se against Ms. Luna in the landlord and tenant division of the superior court. The complaint alleged that Ms. Luna had not paid rent for August, September, and October, and sought a judgment for possession and for $1,325 in unpaid rent. Complaint for Possession of Real Estate (R. 9)

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[1] See, e.g., United States Environmental Protection Agency, Press Release, Landlord Sentenced for Lying About Lead Paint Hazards (Mar. 22, 2002) (Def.'s Default J. Mot. (filed Dec. 24, 2002), Exh. J); Ruben Castaneda, Landlord Gets 2 Years In Probe of Lead Paint, Washington Post, Mar. 14, 2002, at A-10 (Def.'s Default J. Mot., Exh. D); Sewell Chan, D.C. Landlord Indicted in Federal Lead Crackdown, Washington Post, Mar. 15, 2001, at B-5 (Def.'s Default J. Mot., Exh. F).

[2] See, e.g., Verified Answer, Counterclaims and Jury Demand (filed Oct. 25, 2002); Complaint and Jury Demand in Luna v. Nuyen (R. 10-22); Def.'s Resp. to Pl.'s First Set of Interrogs. (Def.'s Default J. Mot., Exh. FF) (R. 49-67).

Ms. Luna, through counsel, filed a verified answer, counterclaims and jury demand. She alleged, among other things, that Mr. Nuyen had breached the implied warranty of habitability by failing to correct violations of the housing code in her apartment. She requested an abatement or refund of the rent that she had paid in excess of the value of the apartment, a setoff or reimbursement for repairs, injunctive relief to require Mr. Nuyen to correct the housing code violations, and such "further relief as the court deems just and proper." See Verified Answer, Counterclaims and Jury Demand (filed Oct. 25, 2001).[3]

3. Ms. Luna's suit. On November 19, 2001, Ms. Luna filed suit against Mr. Nuyen in the civil division of the superior court, seeking recovery for the personal injuries that she and her daughters had suffered due to the collapsed ceiling and other unsafe conditions in the apartment. The complaint asserted claims based on breach of the warranty of habitability, constructive eviction, negligence, and intentional infliction of emotional distress. As relief, Ms. Luna sought compensatory damages, punitive damages, and an injunction to require Mr. Nuyen to bring the premises into compliance with the housing code. See Complaint and Jury Demand in Luna v. Nuyen (filed Nov. 29, 2001) (R. 10).

Mr. Nuyen filed an answer that generally denied Ms. Luna's claims. See Answer Defendant's Answer in Luna v. Nuyen (filed Dec. 19, 2001) (R. 31).

On November 30, 2001, Judge Bayly, over Mr. Nuyen's objection, granted Ms. Luna's motion to consolidate her suit with Mr. Nuyen's landlord-tenant suit. Judge Bayly reasoned that "the spirit of judicial economy" would be served by "permit[ting] the adjudication of both cases

[3] On October 26, 2001, Judge Davis granted Mr. Nuyen's request for a protective order, and directed Ms. Luna to make payments of $400 a month into the court registry. Judge Davis also granted Ms. Luna's motion for a jury trial. See Docket Entry (Oct. 26, 2001).

in one trial." Order (filed Nov. 30, 2001). Judge Bayly directed that the consolidated cases be set for a scheduling conference. Docket Entry (Nov. 30, 2001).

4. Proceedings in the consolidated cases. On February 22, 2002, Judge Bush presided over the scheduling conference in the consolidated cases. Judge Bush entered a scheduling order setting deadlines for discovery and motions practice. The order advised the parties and counsel that the alternative dispute resolution would occur between August 22, 2002, and September 22, 2002, and that the pretrial conference would occur approximately 60 days thereafter. Counsel for both parties acknowledged in writing that they had received the scheduling order. Scheduling Order (Feb. 22, 2002).[4]

In June 2002, after Mr. Nuyen failed to respond to Ms. Luna's interrogatories and requests for production, Ms. Luna filed a motion to compel. In response, Mr. Nuyen's counsel revealed that his client was in federal prison. Opp'n to Mot. to Compel Disc. 2 (filed July 22, 2002).[5] Mr. Nuyen's counsel stated that he had been unable "to learn the prison address for Mr. Nuyen," despite counsel's "good faith efforts," which included unsuccessful attempts "to contact Mr. Nuyen's criminal counsel." Id. at 1.[6] Mr. Nuyen's counsel added that he had recently contacted Mr. Nuyen's wife, who "volunteered to hand carry the materials to Mr. Nuyen on her next visit to prison." Ibid.

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[4] Mr. Nuyen was represented by counsel (apparently provided by his insurance carrier) to defend against Ms. Luna's suit. See Appellant's Br. 1, 6.

[5] On March 13, 2002, Mr. Nuyen was sentenced in his federal prosecution to two years of imprisonment. He was ordered to surrender by April 22, 2002. See Ruben Castaneda, Landlord Gets 2 Years In Probe of Lead Paint, supra.

[6] Mr. Nuyen's counsel did not indicate which of his client's criminal counsel he had attempted to contact. Among Mr. Nuyen's counsel in his criminal prosecution was Daniel Wemhoff, who represents Mr. Nuyen on this appeal. See Docket Sheet in United States v. Nuyen, No. 8:01-cr-00134-DKC-ALL (identifying counsel).

Judge Bush granted the motion to compel, directed Mr. Nuyen to respond to discovery within 30 days, and awarded Ms. Luna the attorneys' fees incurred in connection with the motion. Order (filed Aug. 16, 2002). After Mr. Nuyen failed to respond to discovery by the new deadline, Judge Bush issued a second order, which directed him to respond and warned that she would impose sanctions if he did not. Order (filed Sept. 23, 2002).

On November 13, 2002, Judge Bush conducted a pretrial conference. Mr. Nuyen, who remained incarcerated, did not seek a continuance or send counsel or another representative to the conference. Nor did he file the required pretrial statement before the conference. At the conference, Judge Bush authorized Ms. Luna to file a motion for default judgment. See Def.'s Default J. Mot. (filed Dec. 24, 2002).

5. The settlement of Ms. Luna's case. Also in November 2002, the parties entered into a settlement of Ms. Luna's personal-injury suit. Under the terms of the settlement agreement, Ms. Luna was to receive $16,500 in return for her release of Mr. Nuyen from "all claims, demands, action or damages which arise out of, or in any way relate solely to, the alleged ***personal injury claims of [Ms. Luna] and/or her minor children***, which resulted in the filing of a lawsuit by [Ms. Luna] identified as Luna v. Nuyen Civil Action No. 01CA008500." Settlement & Release 1 (R. 44).

In the agreement, the parties expressly "acknowledge[d] and agree[d] that this Settlement & Release does not limit or otherwise alter or affect any rights, claims, causes or defenses of the parties in the Landlord Tenant action presently pending in the Superior Court of the District of Columbia identified as Home Champion v. Luna L&T No. 042054-01." Settlement & Release 1. The parties further "acknowledge[d] and agree[d] that said L&T action shall continue

unhindered, unimpeded, and without any limitation to the causes or defenses asserted therein, notwithstanding the execution of this agreement." Ibid.

Mr. Nuyen signed the settlement agreement on November 10, 2002, three days before he failed to appear at the pretrial conference. Ms. Luna and her counsel did not sign the agreement until November 14, 2002. Mr. Nuyen's counsel did not date his signature. Settlement & Release 3 (R. 48). The settlement agreement was submitted to Judge Bush for her approval. Praecipe (filed Dec. 10, 2002) (R. 43).

6. The default judgment. On December 24, 2002, Ms. Luna filed her motion for default judgment in this case, together with a supporting memorandum and exhibits, which included her interrogatory responses, government documents, and newspaper articles that addressed, among other things, federal and local charges against Mr. Nuyen based on his wrongdoing as a landlord. In the motion, Ms. Luna requested that the superior court enter judgment in her favor on Mr. Nuyen's claims and her counterclaims. As relief, Ms. Luna requested $4,000 for rent paid directly to Mr. Nuyen, the return of the rent payments that she made into the court registry, $50,000 in punitive damages, and injunctive relief requiring Mr. Nuyen to repair her apartment. Def.'s Default J. Mot. 1-2.

Mr. Nuyen did not file any response to the default judgment motion. On February 26, 2003, Daniel Wemhoff, who was one of Mr. Nuyen's lawyers in his criminal prosecution (see note 6, supra), entered an appearance for Mr. Nuyen "in order to respond to Defendant's Motion for Default Judgment." Praecipe (R. 71). Mr. Wemhoff did not, however, file any response on Mr. Nuyen's behalf.

On June 24, 2003, Judge Bush granted Ms. Luna's default judgment motion "for good cause shown," noting that the motion was "unopposed." Judge Bush awarded Ms. Luna all of the relief that she had requested in the motion. Order (R. 72-73).

7. The denial of vacatur. On July 14, 2003, Mr. Nuyen, acting pro se, filed a motion to vacate the default judgment. He acknowledged that he had received Ms. Luna's default judgment motion "[o]n or about January 3, 2003." He claimed that he had "immediately" filed a response, a copy of which he attached to the motion to vacate. Mot. to Vacate Default Judgment (filed July 14, 2003) (R. 75). The purported response argued that Mr. Nuyen had not known about the November 2002 pretrial conference and that Ms. Luna's apartment had no housing code violation. See Pl.'s Response for Def.'s Mot. for Default J. (R. 68-69).

Judge Bush granted Mr. Nuyen an extension of time until August 22, 2003, within which to amend the motion with the assistance of counsel. On or about August 26, 2003, Mr. Nuyen, through Mr. Wemhoff, filed a second motion to vacate the default judgment, which argued, among other things, that the default judgment was barred by res judicata as a result of the settlement in Ms. Luna's personal-injury suit. See Mot. to Vacate Def. J. Issued in Landlord Tenant Action (filed Aug. 26, 2003).

On October 29, 2003, Judge Bush signed two orders in the consolidated cases. One of the orders denied Mr. Nuyen's motion to vacate the default judgment in this landlord-tenant case. Order (docketed Nov. 6, 2003). The other order dismissed with prejudice the claims asserted in Ms. Luna's personal-injury case "in accordance with terms of the Settlement & Release." Order of Dismissal (docketed Oct. 31, 2003) (R. 102).

INTRODUCTION AND SUMMARY OF ARGUMENT

The superior court acted within its broad discretion in denying Mr. Nuyen's motion to vacate the default judgment. This Court has recognized that a trial court is justified in declining to vacate a default judgment entered against a litigant who has displayed "a willful or negligent disregard of the court's process." Butler v. United States, 268 A.2d 862, 864 (D.C. 1970). The record is replete with such disregard by Mr. Nuyen. After Mr. Nuyen failed to retain counsel to represent him in this matter while he served an extended prison sentence, failed to respond to discovery in a timely manner, failed to appear at a pretrial conference (and, by his own admission, could not have appeared, whether or not he actually knew about it), and failed for six months to file a response to Ms. Luna's motion for default judgment, the superior court was not obligated to give him yet another chance to litigate the case from his prison cell or through sporadically appearing counsel.

The only question properly presented on this appeal is whether the superior court abused its discretion in denying Mr. Nuyen's motion to vacate the default judgment under Rule 60(b) of the Rules of Civil Procedure. See, e.g., Dunn v. Profitt, 408 A.2d 991, 992 (D.C. 1979) ("The ruling on a motion to vacate default judgment is within the sound discretion of the trial judge."). Although "the judicial policy of favoring trial on the merits will often justify reversal where even a slight abuse of discretion has occurred in refusing to set aside a judgment," id. at 993, there was no such abuse here. The superior court was entitled to conclude, in the highly unusual circumstances of this case, that "the important need for finality in litigation," ibid., outweighed any interest in affording Mr. Nuyen the trial on the merits that his own conduct had persistently delayed. See Johnson v. Marcheta Investors Limited Partnership, 711 A.2d 109, 111 (D.C. 1998)

("Our review of any denial of a Rule 60(b) motion in a case such as this 'recognizes that there is a judicial preference for resolution of disputes on the merits rather than by the harsh sanction of dismissal. * * * However, we are also mindful that a plaintiff must prosecute [her] action with due diligence or suffer dismissal.'") (quoting Bond v. Wilson, 398 A.2d 21, 24 (D.C. 1979)).

Although Mr. Nuyen noticed an appeal from the superior court's denial of his Rule 60(b) motion to vacate the default judgment, he did not notice an appeal from the default judgment itself. Consequently, while much of his appellate brief is devoted to challenges to the default judgment (see Appellant's Br. 16-25), those challenges are not properly before the Court. As the Court has explained, when, "on appeal, appellant challenges only the Rule 60(b) ruling" declining to reinstate his suit, "we do not face directly the issue of whether the trial court's original order of dismissal itself is sustainable." Johnson v. Berry, 658 A.2d 1051, 1054 n.5 (D.C. 1995).

In any event, Mr. Nuyen's challenges to the default judgment are without merit. Because the consolidation did not, as Mr. Nuyen suggests, prevent the parties from settling Ms. Luna's personal-injury case while continuing to litigate this case, his arguments based on Rule 42 of the Rules of Civil Procedure, the "law of the case" doctrine, and res judicata are incorrect. And, because Mr. Nuyen has repeatedly evinced a reckless disregard for the health and safety of Ms. Luna and other economically vulnerable tenants, the $50,000 punitive damages award fully comports with due process principles. Although the ratio of punitive damages to actual damages is 7.6 to 1 -- not the 12.5 to 1 ratio that Mr. Nuyen claims -- either ratio would be constitutionally permissible in view of the egregiousness of Mr. Nuyen's conduct.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO VACATE THE DEFAULT JUDGMENT

In order to prevail on a motion to vacate the default judgment, Mr. Nuyen would have had to demonstrate an entitlement to relief both under one of the six subsections of Rule 60(b)[7] and under the five-factor analysis articulated in Starling v. Jephunneh Lawrence Associates, 495 A.2d 1157 (D.C. 1985),[8] and other decisions of this Court. See, e.g., Mourning v. APCOA Standard Parking, Inc., 828 A.2d 165, 167, 168 (D.C. 2003) (recognizing that the availability of vacatur turns on the applicability of both Rule 60(b) and the Starling factors); accord, e.g., Ripalda v. American Operations Corp., 673 A.2d 659, 662 (D.C. 1996); Reid v. District of Columbia, 634 A.2d 423, 425 (D.C. 1993). Mr. Nuyen did not do so below, and he has not done so here. He has not even invoked any particular subsection of Rule 60(b), much less addressed how any such

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[7] Rule 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relief a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse part; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

[8] In Starling, the Court explained that, in the context of a Rule 60(b) motion for relief from a default judgment, the relevant considerations include "whether the movant (1) had actual notice of the proceedings; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense," as well as any "[p]rejudice to the non-moving party." 495 A.2d at 1159-1160.

subsection might apply to his situation. Although he does address the Starling factors, most of them militate against his position, thereby justifying the denial of his Rule 60(b) motion.[9]

A. Mr. Nuyen Failed To Demonstrate That His Motion To Vacate The Default Judgment Satisfied Any Subsection Of Rule 60(b)

Of the six subsections of Rule 60(b), only two are even potentially applicable to this case: Rule 60(b)(1), which authorizes a court to grant relief from a final judgment for reasons of "mistake, inadvertence, surprise, or excusable neglect," and the catch-all Rule 60(b)(6), which authorizes a court to grant such relief for "any other reason justifying relief from the operation of the judgment." Neither subsection (or any other subsection of Rule 60(b)) encompasses a litigant's effective abandonment of a case that he himself brought.

1.a. This Court has distinguished default judgments and dismissals resulting from insolated instances of "mistake, inadvertence, surprise, or excusable neglect," for which relief is available under Rule 60(b)(1), from default judgments and dismissals resulting from a pattern of dereliction by a litigant, for which relief is not available. See, e.g., Ripalda, 673 A.2d at 662-664; Clay v. Deering, 618 A.2d 92, 94-96 (D.C. 1992); Joyce v. Walker, 593 A.2d 199, 202 (D.C. 1991); Bond, 398 A.2d at 24-25; Butler, 268 A.2d at 863-864.

In Butler, for example, the Court affirmed the denial of a defendant's motion under Rule 60(b)(1) to vacate a default judgment entered after she failed to appear in landlord-tenant court on the date specified in the summons and complaint. The evidence indicated that the defendant,

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[9] When a party seeks relief under Rule 60(b)(1), the determination whether any "neglect" is "excusable" may entail a consideration of factors such as those articulated in Starling. See, e.g., Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 392 n.10 (1993) ("In assessing what constitutes 'excusable neglect' under [Federal Rule of Civil Procedure] 13(f), the lower courts have looked, inter alia, to the good faith of the claimant, the extent of the delay, and the danger of prejudice to the opposing party.") (citing cases). In such circumstances, the Rule 60(b)(1) inquiry and the Starling inquiry overlap.

after "glanc[ing]" at the summons and misreading the return date, "threw it at the deputy marshal," and did nothing to confirm the return date on the copy left with her resident manager. 268 A.2d at 863. This Court held that the denial of the Rule 60(b)(1) motion "was a sound exercise of [the trial court's] discretion," explaining that "the trial court could have found from the evidence presented a willful or negligent disregard of the court's process." Id. at 864.

Similarly, in Bond, the Court affirmed the denial of a Rule 60(b)(1) motion to vacate the dismissal of a plaintiff's personal-injury case entered after the plaintiff and his counsel twice failed to appear for trial. 398 A.2d at 24-25. Although the Court found that counsel's conduct up until the date of the second trial was "so egregious that in fairness it could not be imputed to [the plaintiff]," the plaintiff's "own inaction thereafter" in failing to pursue the case for months precluded a finding of "excusable neglect" that would permit relief under Rule 60(b)(1). Ibid.

Under the federal counterpart of Rule 60(b)(1) as well, courts and commentators have recognized that relief is not available in cases of willfulness or "[g]ross carelessness," including "when the party or attorney did not act diligently to discover the purported mistake, did not proceed with the case, did not keep track of its progress, or failed to comply with an order of the court." 11 Charles Alan Wright et al., Federal Practice & Procedure § 2858, at 277-278, 289-291 (2d ed. 1995); see, e.g., Easley v. Kirmsee, 382 F.3d 693, 698 (7th Cir. 2004) (explaining that "inattentiveness to litigation is not excusable" under Rule 60(b)(1) and that relief was properly denied in a case of "outright and consistent disregard of a court's scheduling orders"); Whitaker v. Associated Credit Servs., Inc., 946 F.2d 1222, 1224 (6th Cir. 1991) (observing that Rule 60(b)(1) relief generally is not warranted in cases of "gross negligence"); Edward H. Bohlin Co. v. Bannin Co., 6 F.3d 350, 357 (5th Cir. 1993) ("Gross carelessness, ignorance of the rules, or ignorance of the law are insufficient bases for 60(b)(1) relief."); cf. Pioneer Investment Servs.

Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 392 (1993) (observing that a movant's "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect," although the term "is not limited strictly to omissions caused by circumstances beyond the control of the movant"). This Court has recognized that authorities interpreting Federal Rule 60(b) "are persuasive authority in interpreting the local rule." Clement v. District of Columbia Dep't of Human Servs., 629 A.2d 1215, 1219 n.8 (D.C. 1993).

b. Rule 60(b)(6) likewise does not afford relief from a default judgment or dismissal entered in response to the dereliction of a litigant or his counsel. As the Court has explained, "a necessary prerequisite to relief under Rule 60(b)(6) is that circumstances beyond the [movant's] control prevented timely action to protect its interests." Tennille v. Tennille, 791 A.2d 79, 83 (D.C. 2002) (internal quotation marks omitted); cf. Cox v. Cox, 707 A.2d 1297, 1299 (D.C. 1998) (observing that Rule 60(b)(6)'s "scope is extremely meager").

In Tennille, for example, the Court affirmed the denial of a defendant's motion under Rule 60(b)(6) to vacate a default judgment entered in a breach-of-contract suit brought by his former wife. The Court explained that, because the defendant made a "free, calculated and deliberate choice" to ignore the complaint, which he considered vexatious, he "willfully disregarded the court's processes," and thus was not entitled to Rule 60(b)(6) relief. 791 A.2d at 85; see also, e.g., Johnson, 711 A.2d at 111-112 (holding that there were no "unusual or exceptional" circumstances that warranted granting Rule 60(b) relief to a plaintiff whose personal-injury case had been dismissed more than a year earlier for want of prosecution).

2. Mr. Nuyen's conduct in this case reflects the sort of "willful or negligent disregard" of the judicial process, Butler, 268 A.2d at 864, for which relief is not available under Rule 60(b)(1) or Rule 60(b)(6). If anything, Mr. Nuyen's conduct is more egregious than that involved in many

of the previous cases in which of this Court has affirmed the denial of a motion under those provisions.

First, Mr. Nuyen, acting pro se, filed this case against Ms. Luna on October 2, 2001. At that time, Mr. Nuyen was awaiting sentencing on federal felony charges of obstruction of justice and submitting false documents to the government. See Ruben Castaneda, Landlord Admits Not Warning D.C. Tenants About Lead Paint, Washington Post, July 12, 2001, at B-4 (Def.'s Default J. Mot. (filed Dec. 24, 2002), Exh. BB). Under the terms of the guilty plea agreement, Mr. Nuyen was expected to be sentenced to two years of imprisonment. Ibid. At least by October 26, 2001, when Ms. Luna's request for a jury trial was granted, Mr. Nuyen, an experienced pro se litigant in landlord-tenant court,[10] knew or reasonably should have known that the case was unlikely to be concluded before his incarceration.

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[10] While he was in prison, Mr. Nuyen wrote a book that purports to give advice on real estate investing. In that book, Mr. Nuyen discussed his practice of litigating landlord-tenant cases pro se:

> I used to sue problem tenants myself and went to landlord-tenant and civil courts myself without an attorney. Most of my cases were about non-payment of rents. I always tried to settle the cases at the initial hearing or well before the trials. During my nineteen years of property management, I experienced seven liability cases with opposing attorneys working on a contingency cases. * * * In liability law suits, plaintiff's attorneys always try to drag out the cases with the intention of forcing the insurance company to settle if the property had liability insurance coverage or forcing me to settle if I had hired an attorney. Therefore, I used to defend the cases myself and was ahead of the game most of the time.

See David Nuyen, The Tao of Real Estate Investing With Confidence: An Easy Road to Wealth, at 1-18 to 1-19 (NuMaxReins 2004); see id. at 27-9 ("With proper reading of instructions available in court houses, local and federal government offices, we can handle ourselves most routine legal-related situations. Even in more complicated situations, with proper help from court clerks, we can also do the filings ourselves. However, when the situation is complicated, we may want to seek help from a lawyer in the early phase of the problem. Late help obtained as a last resort, is often too late to be of any help.") (paragraphing omitted).

On March 13, 2002, the federal court presiding over Mr. Nuyen's prosecution imposed the anticipated two-year prison sentence and ordered his surrender by April 22, 2002. See Ruben Castaneda, Landlord Gets 2 Years In Probe of Lead Paint, Washington Post, Mar. 14, 2002, at A-10 (Def.'s Default J. Mot., Exh. D). Although this landlord-tenant suit against Ms. Luna remained pending at the time of his departure for prison, Mr. Nuyen did not move for a stay of the proceedings. Nor did he arrange for counsel to represent him in the suit (although he did have counsel though his insurance carrier to represent him in Ms. Luna's related personal-injury suit). Such conduct reflects a negligent or willful disregard for his obligations to the court and his opponent.

Second, after the consolidation of Ms. Luna's suit with this suit and the entry of a scheduling order, Mr. Nuyen was responsible for several months of delay in the discovery process. In June 2002, after Mr. Nuyen had failed to respond in a timely manner to Ms. Luna's interrogatories and requests for production, Ms. Luna filed a motion to compel. In response, Mr. Nuyen's counsel stated that, because he had been unable "to learn the prison address for Mr. Nuyen" despite his "good faith efforts," he had not even forwarded the discovery requests to Mr. Nuyen before the deadline had passed for responding to them. Opp'n to Mot. to Compel Disc. 2 (filed July 22, 2002). Counsel added that he had only recently contacted Mr. Nuyen's wife, who "volunteered to hand carry the materials to Mr. Nuyen on her next visit to the prison." Ibid. It thus appears that Mr. Nuyen went off to prison without even making arrangements with his

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While Mr. Nuyen had a choice whether to proceed with counsel or pro se, most low-income tenants sued in the District's landlord-tenant court have no such choice, because they cannot afford to retain counsel and the demand for free legal assistance far exceeds the supply. See Final Report of the D.C. Bar Landlord-Tenant Task Force 5 (1998) (noting that 86% of landlords, but fewer than 1% of tenants, are represented by counsel in landlord-tenant court).

(insurer-provided) counsel as to how he could be contacted with regard to this litigation. Such conduct reflects a negligent or willful disregard for his obligations to the court, his opponent, and even his own counsel.[11]

The superior court granted Ms. Luna's motion to compel, directed Mr. Nuyen to respond to discovery within 30 days, and awarded Ms. Luna the attorneys' fees incurred in connection with the motion. Order (filed Aug. 16, 2002). When Mr. Nuyen failed to respond to discovery by the new deadline, the court issued a second order directing him to respond and warning that any further recalcitrance would result in the imposition of sanctions, including monetary sanctions of $500. Order (filed Sept. 23, 2002).

Third, on November 13, 2002, Mr. Nuyen did not appear at a previously scheduled pretrial conference. Nor did counsel appear on his behalf. Ms. Luna and her counsel did appear. See Def.'s Default J. Mot. 2. While Mr. Nuyen suggests that he may not have received notice of the pretrial conference, he concedes that whether or not he received notice is immaterial, because he could not have taken leave from prison to attend the conference and he had not retained counsel to appear in his stead. See Appellant's Br. 12. Moreover, there is no indication in the record of any attempt by Mr. Nuyen to inform the court of a prison address to which a notice might be sent. Such conduct again reflects a negligent or willful disregard for his obligations to the court and his opponent.

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[11] At that time, Mr. Nuyen's counsel erroneously represented to the court that "Mr. Nuyen is not scheduled for release until the end of the year 2002" (Opposition 2), although Mr. Nuyen had, in fact, been sentenced in March 2002 to a two-year term of imprisonment, and thus would remain in prison until at least early 2004. The erroneous statement is further indication of Mr. Nuyen's failure to communicate with the court and his counsel regarding information vital to the proceedings.

Fourth, although Mr. Nuyen concedes that he received Ms. Luna's motion for default judgment in a timely manner (see Appellant's Br. 2), he did not file any response to that motion during the six months that it remained pending before the superior court. And, although Mr. Nuyen's present counsel, Mr. Wemhoff, entered an appearance in the case on February 26, 2003, "in order to respond to defendant's motion for default judgment," Mr. Wemhoff never filed a response, either. Finally, on June 24, 2003, the court granted the motion for default judgment as "unopposed." Order (R. 72-73).

In sum, the superior court could reasonably discern from Mr. Nuyen's course of conduct a "willful or negligent disregard" of the judicial process, Butler, 268 A.2d at 864, rather than the sort of isolated "mistake" or "excusable neglect" to which subsections Rule 60(b)(1) is directed. For that reason, the court did not abuse its discretion in declining to vacate the default judgment.

B. Mr. Nuyen Failed To Demonstrate That His Motion To Vacate The Default Judgment Satisfied The Starling Analysis

As noted, in addition to demonstrating that his motion to vacate the default judgment was properly based on one of the grounds for relief set forth in Rule 60(b)(1) through (6), Mr. Nuyen had to demonstrate that such relief was warranted under the Starling analysis. See pp. 9-10, supra. That analysis considers whether the moving party "(1) had actual notice of the proceedings; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense," as well as whether the opposing party has been prejudiced. Starling, 495 A.2d at 1159-1160. Because Mr. Nuyen did not, and could not, demonstrate to the superior court that the Starling factors militated in his favor, the court acted within its discretion in leaving the default judgment in place.

1. Mr. Nuyen had notice of the proceedings. Having personally commenced this landlord-tenant suit against Ms. Luna, Mr. Nuyen indisputably had notice of it. Moreover, just three days before he failed to appear, personally or through counsel, at the pretrial conference in the case, Mr. Nuyen signed a document, titled "Settlement & Release," that expressly recognized that the suit was to remain pending despite any settlement of the consolidated personal-injury suit brought by Ms. Luna. See Settlement & Release 1 (R. 44) (stating that the parties "acknowledge and agree that this Settlement & Release does not limit or otherwise alter or affect any rights, claims, causes or defenses of the parties in the Landlord Tenant action presently pending in the Superior Court of the District of Columbia identified as Home Champion v. Luna L&T No. 042054-01"). Mr. Nuyen further acknowledged that he had "read [the Settlement & Release], understood its conditions, consulted with and had the advice of counsel, and voluntarily signed it." Id. at 4 (R. 47).

It is irrelevant whether, as Mr. Nuyen suggests, he did not receive actual notice of the November 13, 2002, pretrial conference. See Appellant's Br. 14. Mr. Nuyen concedes that "he was not in a position due to his circumstance [i.e., being in prison] to attend a pretrial conference had he been made aware of it." Id. at 12. Mr. Nuyen further concedes that he had not, as of that time, retained counsel who might have represented him at the conference. See id. at 7 (noting that he "eventually" retained present counsel "to assist him and represent him while he was imprisoned"). Nor had Mr. Nuyen sought a stay of the suit during his incarceration or, for all it appears, even informed the court of his prison address so that notices could be sent to him. See Union Storage Co. v. Knight, 400 A.2d 316, 319 (D.C. 1979) (explaining that a court is not required to grant Rule 60(b) relief "when the circumstances show that the movant did not receive actual notice because of his own negligence").

Mr. Nuyen's assertion that he did not receive notice of the pretrial conference -- like the other factual assertions contained in his motions to vacate and now in his appellate brief -- are not supported by a sworn affidavit or other evidence. The superior court was not required to accept such assertions from Mr. Nuyen, a convicted liar, even if they are assumed arguendo to have some relevance to the vacatur question. See Alexander v. Polinger Co., 496 A.2d 267 (D.C. 1985) (affirming the denial of a motion to vacate when the movants did not submit affidavits or other evidence to support their claim of invalid service). The court likewise was not required to suspend the case until sometime after Mr. Nuyen was released from prison and might deign to appear at an evidentiary hearing at which his credibility could be assessed.

2. Mr. Nuyen did not demonstrate good faith. Mr. Nuyen's assertions that he acted in good faith are negated by his acknowledged failure to make arrangements for the prosecution of this case during his two-year incarceration, with the consequence that Ms. Luna's discovery requests were ignored, the pretrial conference was unattended, and even Ms. Luna's default judgment motion was unanswered. See, e.g., Clay, 618 A.2d at 95 (holding that a movant's lack of good faith was demonstrated by unjustified failure to comply with court orders and discovery requests). Mr. Nuyen offered no explanation to the superior court for this apparent flouting of its processes.

Mr. Nuyen muses in his appellate brief about why he "may" have disregarded whatever notice he received of the pretrial conference. See Appellant's Br. 14. But those musings are insufficient to establish good faith. And some are incredible on their face. For example, while Mr. Nuyen suggests that "he may have been distracted in receiving mailed notice during that interval as he was preparing for sentencing in a federal matter" (ibid.), the pretrial conference occurred eight months after Mr. Nuyen's federal sentencing (and a full year after the incorrect

sentencing date given in his brief, ibid. n.*). See Ruben Castaneda, Landlord Gets 2 Years In Probe of Lead Paint, supra. And, while Mr. Nuyen also suggests that he may have believed that the settlement concluded this landlord-tenant suit as well as Ms. Luna's personal-injury suit (Appellant's Br. 14), the express language of the settlement agreement provides otherwise. See Settlement & Release 1 (R. 44) (stating that the parties "acknowledge and agree that said L&T action shall continue unhindered, unimpeded, and without any limitation to the causes or defenses asserted therein, notwithstanding the execution of this agreement"). In any event, since Mr. Nuyen did not offer any of these excuses to the superior court in support of his motion to vacate the default judgment, they cannot provide a basis to find that the court abused its discretion in denying the motion.

3. Mr. Nuyen did not take prompt action. Contrary to Mr. Nuyen's assertions (see Appellant's Br. 14), the mere fact that he moved to vacate the default judgment within weeks of its entry does not satisfy Starling's requirement of prompt action. As this Court has explained, a movant's "promptness in coming forward after the [default] judgment was entered carries little or no weight" when the movant was already aware that the matter was pending but ignored it. Venison v. Robinson, 756 A.2d 906, 911 (D.C. 2000); see ibid. ("We recognize that the focus of this factor is on the promptness with which the party against whom the default judgment was entered took action to challenge it after learning about it. However, this presupposes that the party was unaware of the proceedings against him up to that point."). Here, Mr. Nuyen does not dispute that he received Ms. Luna's motion for default judgment on or before January 3, 2003. Yet, as previously noted, Mr. Nuyen did not file a response to that motion during the six months that it remained pending before the superior court. His timely filing of the motion to vacate is not, therefore, entitled to any significant weight in the Starling analysis.

Although Mr. Nuyen claims that he attempted to file a response to the default judgment motion on January 6, 2003 (Appellant's Br. 2), the superior court's docket reflects no such filing during the six-month period. Nor was any such filing received by Ms. Luna's trial counsel during that time. See Def.'s Mem. of Points and Authorities in Opp'n to Pl.'s Mot. to Vacate Default J. 3 (filed July 24, 2003). That Mr. Nuyen's counsel, Mr. Wemhoff, entered an appearance in the case on February 26, 2003, "in order to respond to defendant's motion for default judgment" (R. 71) casts further doubt on Mr. Nuyen's assertions that he had already filed a response pro se weeks earlier.

Although Mr. Nuyen claims that he came to suspect that the response had not reached the court and "eventually" had "an 'assisting counsel' make copies of his 'Response' available to the Clerk and chambers of Judge Bush" (Appellant's Br. 2, 14), the superior court's characterization of the default judgment motion as "unopposed" in its June 24, 2003, Order (R. 72) indicates that it had not, in fact, received any response from Mr. Nuyen by that date. Of course, regardless of any problems Mr. Nuyen might have experienced with mail delivery between prison and the court (or prison and Ms. Luna's counsel), Mr. Wemhoff, upon his appearance in the case, could have filed and served a response, whether a new one or the one that Mr. Nuyen now claims to have previously prepared. But Mr. Wemhoff himself filed nothing during the four months between his appearance in the case and the disposition of the motion for default judgment. See Bond, 398 A.2d at 24 (observing, in the context of a Rule 60(b)(1) motion, that, "[a]s a rule, 'the acts and omissions of counsel are imputed to the client even though they are detrimental to the client's cause'") (quoting Railway Express Agency, Inc. v. Hill, 250 A.2d 923, 926 (D.C. 1969)).

4. Mr. Nuyen did not present a prima facie adequate defense. Mr. Nuyen errs in relying on his answer to Ms. Luna's complaint in the consolidated personal-injury suit as demonstrating

a prima facie adequate defense to Ms. Luna's counterclaims in this suit.[12] Mr. Nuyen's answer consists of nothing more than a general denial of Ms. Luna's claims. See Defendant's Answer in Luna v. Nuyen (filed Dec. 19, 2001) (R. 31). The Court has made clear that "more than a bald allegation" is required "to state a prima facie adequate defense." Clay, 618 A.2d at 95; see, e.g., Brady v. Graham, 611 A.2d 534, 536 (D.C. 1992) ("[P]rinciples of notice pleading are inapplicable to the context of motions to set aside a default judgment.") (citing In re Stone, 588 F.2d 1316, 1319 (10th Cir. 1978)). Hence, the Rule 60(b) movant must offer "a sufficient elaboration of the facts * * * to permit the trial court to conclude whether the defense, if found to be true, is adequate." Tennille, 791 A.2d at 83; see, e.g., Venison, 657 A.2d at 911 (explaining that a movant's "simple assertion, completely unsupported by any evidence," was insufficient to demonstrate a prima facie adequate defense).

Nor has Mr. Nuyen shown a prima facie adequate defense based on his allegations of "a questionable splitting" of cases that had previously been consolidated. Appellant's Br. 15. As explained more fully below in connection with Mr. Nuyen's (unpreserved) challenge to the default judgment, a consolidation order does not require that all of the claims in the consolidated cases be disposed of simultaneously. Consolidation does not prevent the disposition of some claims -- by, for example, settlement or summary judgment -- while other claims remain to be tried. There is consequently no merit to Mr. Nuyen's contention that the consolidation order, though the operation of "law of the case" or res judicata principles, somehow barred the superior court from ruling on those claims of his and Ms. Luna's that had not been settled.

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[12] The Court has stated that only defendants, not plaintiffs, are required to make a prima facie showing of the adequacy of their position. See Johnson, 658 A.2d at 1054. Mr. Nuyen is, of course, a defendant with respect to Ms. Luna's counterclaims in this suit.

5. Ms. Luna has been prejudiced by Mr. Nuyen's conduct. Because Mr. Nuyen failed to prosecute this case with reasonable diligence, Ms. Luna's opportunity to obtain the relief that she sought on her counterclaims was impaired and delayed. For one thing, because memories may fade and evidence may be lost with the passage of time, Mr. Nuyen's conduct jeopardized Ms. Luna's ability to prove her case on the merits. See Union Storage, 400 A.2d at 319 (noting such prejudice). In addition, Mr. Nuyen's conduct delayed the date at which Ms. Luna, if successful, could obtain her requested relief of, inter alia, a refund of previously paid rent and the correction of housing code violations. See Verified Answer, Counterclaims and Jury Demand 4-8 (filed Oct. 25, 2001). For an individual living in poverty, such as Ms. Luna, even a short delay in the receipt of moneys to which she is entitled may have significant adverse consequences.[13] Such an individual may also be particularly dependent on her landlord to correct unsafe or unsanitary conditions in the premises, which here included malfunctioning plumbing, rodent and insect infestation, a broken door and window, and missing fire alarms. See id. at 2-3.

Mr. Nuyen is incorrect in suggesting that Ms. Luna was not prejudiced by his neglect of this case because she received a $16,500 settlement in her consolidated case. See Appellant's Br. 15. That settlement, however, was designed to compensate Ms. Luna and her children for the "personal injuries" that they suffered as a result of accidents, such as the ceiling collapse, that occurred in the apartment. Settlement & Release 1 (R. 44). It was not designed to compensate for the separate harm alleged in Ms. Luna's counterclaims in this case, including the harm of having been erroneously charged rent for an apartment with significant housing code violations that Mr. Nuyen refused to correct. See Answer, Counterclaims, and Jury Demand 4-5.

[13] Ms. Luna was granted in forma pauperis status in this case. Docket Entry (Oct. 26, 2001).

Finally, even if Mr. Nuyen had shown that he satisfied one or two of the Starling factors, that would not entitle him to relief from this Court. See, e.g., Clay, 618 A.2d at 95 (observing that the movant's "willfulness alone, even without a showing of prejudice to the opposing party, can warrant dismissal") (quoting Hinkle v. Sam Blanken & Co., 507 A.2d 1046, 1050 (D.C. 1986); Joyce, 593 A.2d at 202 (observing that the movant's "good faith" was irrelevant given her "pattern" of dilatory conduct "amounting to gross negligence"). Instead, Mr. Nuyen would have to establish that the various Starling factors, on balance, militate so strongly in his favor that the superior court abused its discretion in not vacating the default judgment. He has not come close to making such a showing here.

II. MR. NUYEN'S CHALLENGE TO THE DEFAULT JUDGMENT IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, IS WITHOUT MERIT

A. Mr. Nuyen Failed To Appeal The Default Judgment

Mr. Nuyen noticed an appeal only from the superior court's order of November 6, 2003, denying his Rule 60(b) motion to vacate the default judgment. See Notice of Appeal (filed Dec. 3, 2003). He never noticed an appeal from the underlying default judgment. Mr. Nuyen's various challenges to the default judgment are not, therefore, properly before the Court.[14]

"[W]hen considering the denial of a Rule 60(b) motion, this court will not review or determine the merits of the underlying action but only decide whether there has been an abuse of discretion in the denial." Hahn v. District of Columbia Water & Sewer Auth., 727 A.2d 317, 321

[14] Mr. Nuyen's initial motion to vacate the default judgment (R. 75) was filed on July 14, 2003, and thus more than ten days (excluding the intervening weekends and holiday) after the entry of the default judgment on June 24, 2003. The motion thus could not operate to stay the time for appealing from the judgment. See Ct. App. R. 4(a)(4)(A)(v). Accordingly, even if the Notice of Appeal purported to encompass an appeal of the default judgment (which it does not), such an appeal would be untimely.

(D.C. 1999) (internal quotation marks omitted); see, e.g., Johnson, 658 A.2d at 1054 n.5 (D.C. 1995) ("[O]n appeal, appellant challenges only the Rule 60(b) ruling. Thus, we do not face directly the issue of whether the trial court's original order of dismissal itself is sustainable."); Reid, 634 A.2d at 424; Joyce, 593 A.2d at 200; State Farm Mut. Auto. Ins. Co. v. Brown, 593 A.2d 184, 185 (D.C. 1991).

In federal court practice as well, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." Browder v Director, Dep't of Corrections, 434 U.S. 257, 263 n.7 (1978) (citing authorities); see, e.g., Cordova Torres v. Chater, 125 F.3d 166 (3d Cir. 1997) ("An order denying relief under Rule 60(b) is an appealable order, but the appeal brings up only the correctness of the order itself.") (quoting Daily Mirror, Inc. v. New York News, Inc., 533 F.2d 53, 56 (2d Cir. 1976)); 11 Charles Alan Wright et al., Federal Practice & Procedure § 2871, at 424 ("[A]n appeal from a denial of the [Rule 60(b)] motion brings up for review only the order of denial itself and not the underlying judgment.").

Because Mr. Nuyen appealed only Judge Bush's order denying Rule 60(b) relief, this Court "cannot review the merits of the judge's initial order" of default judgment against Mr. Nuyen, but may consider "only the question whether the judge abused her discretion by declining to vacate her prior order." Fleming v. District of Columbia, 633 A.2d 846, 849 (D.C. 1993). More specifically, the Court cannot appropriately reach Mr. Nuyen's arguments that the default judgment is erroneous as contrary to Rule 42(a) and the "law of the case" doctrine (Appellant's Br. 16-20); or that the default judgment is erroneous as contrary to res judicata (id. at 21-23), or that the default judgment's award of punitive damages violates due process (id. at 24-25). And, even if the Court did have jurisdiction to consider Mr. Nuyen's challenges to the default judgment and its punitive damages award, those challenges are without merit.

B. The Consolidation Order Did Not Bar The Entry Of A Default Judgment In This Suit After The Settlement Of Ms. Luna's Consolidated Suit

Mr. Nuyen's challenges to the entire default judgment (as distinguished from its punitive damages award) proceed from a single erroneous premise: that the order under Rule of Civil Procedure 42(a) consolidating this case and Ms. Luna's personal-injury case required the cases to be disposed of simultaneously, so that the parties could not, for example, settle Ms. Luna's case and then continue to litigate this case. It is not surprising that Mr. Nuyen cites no judicial or other authority in support of his peculiar notion of consolidation. The settled authority is to the contrary.[15]

In the first place, even when multiple claims involving common factual issues are raised in a single case, rather than in separate cases that are later consolidated, there is no legal impediment to the parties' settling some of the claims and reserving the rest for trial (or other disposition on the merits). In William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. 1970), for example, the tenant filed a suit against her landlord asserting both a personal-injury claim based on a rat bite to the tenant's child and a claim to recover rent paid under a lease that had been held void due to housing code violations. The parties settled the personal-injury claim, and the tenant later obtained summary judgment on the rent refund claim. This Court, after noting the

[15] Mr. Nuyen also contends that the final sentence of Rule 42(a), which provides that "all of the consolidated cases shall be placed on the calendar of the judge who granted the [consolidation] motion," was violated because the consolidated cases were assigned not to Judge Bayly, who granted the motion, but to Judge Bush, who presided over all subsequent proceedings in the two cases. The record does not reflect any contemporaneous objection by Mr. Nuyen, personally or through his then-counsel, to the assignment of the consolidated cases to Judge Bush. See R. Civ. P. 46 (requiring that "a party, at the time the ruling or order of the Court is made or sought, make[] known to the Court the action which the party desires the Court to take or the party's objection to the action of the Court and the grounds therefore"). Moreover, even if a technical violation of Rule 42(a) is assumed arguendo to have occurred, any such violation would have to

settlement, see id. at 413 n.1, proceeded to consider, and ultimately to reject, the landlord's challenge to the summary judgment on the merits, see id. at 414-416. Although no question was specifically raised in Davis as to whether one claim could be disposed of by settlement and the other by adjudication, Davis reflects that this Court, the trial court, and the parties understood that practice to be unexceptionable. Hence, even if the consolidation order had the legal effect of merging this suit and Ms. Luna's suit into one, the parties would be free to settle Ms. Luna's personal-injury claims and to continue to litigate the parties' remaining claims.

Moreover, consolidation under Rule 42(a) did not, as Mr. Nuyen suggests, effect such a merger. As the Supreme Court has explained, "consolidation is permitted as a matter of convenience and economy in administration but does not merge the suits into a single cause, or change the rights of the parties." Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-497 (1933) (quoted in 9 Charles Alan Wright et al., Federal Practice & Procedure § 2382, at 430 (2d ed. 1995)); see Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284, 288 (D.C. 1977) (noting that, because of the similarity of the federal and local rules on consolidation, "federal cases are authority in interpreting" local Rule 42(a)). This Court has likewise observed that "consolidation does not merge suits into a single action so far as ultimate relief is concerned," but simply requires the suits to be handled as one "for the purposes of effective administration of justice." Dixon v. AM General Corp., 454 A.2d 1357, 1359 (D.C. 1983).

In Dixon, this Court held that, notwithstanding that "consolidated actions do not lose their separate identity," a ruling that disposes of fewer than all of the claims in all of the consolidated cases is not final and appealable unless the trial court certifies an appeal under Rule 54(b).

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be disregarded as harmless, for Mr. Nuyen does not, and cannot, show that it affected the parties' substantial rights. See R. Civ. P. 61.

Dixon, 454 A2d at 1358-1359. Dixon thereby confirms, if further confirmation were required, that consolidation does not require that each and every claim in consolidated cases be resolved at the same time. Parties are free to seek the pretrial resolution of fewer than all claims, as by settlement or summary judgment, and courts are free to allow such resolution.

Nothing in the consolidation order in this case that suggests the slightest departure from that general understanding. That order does not purport to merge the two cases into one. It merely provides, "[i]n the spirit of judicial economy," for consolidation "so as to permit the adjudication of both cases in one trial." Order (entered Nov. 30, 2001). Hence, because there is no law in this case that prevented the settlement of some claims and the continued litigation of others, Mr. Nuyen's reliance on the "law of the case" doctrine is misplaced.

Mr. Nuyen's reliance on res judicata is misplaced as well. Mr. Nuyen appears to argue that, because the consolidation order found that this case and Ms. Luna's personal-injury case share some issues of fact, the settlement of Ms. Luna's case operated as a bar to further litigation of her claims in this case. That is incorrect. As a threshold matter, an essential prerequisite to the application of res judicata is "a final judgment on the merits." Carr v. Rose, 701 A.2d 1065, 1070 (1997); accord, e.g., Kovach v. District of Columbia, 805 A.2d 957, 960 (D.C. 2002); Interdonato v. Interdonato, 521 A.2d 1124,1131, n.11 (D.C. 1987). At the time that the superior court entered the default judgment in this case, no final judgment had been entered in Ms. Luna's personal-injury case. It was not until October 29, 2003, more than four months after the entry of the default judgment, that the court entered an order dismissing and closing the personal-injury case in accordance with the parties' settlement. See Order (filed Oct. 29, 2003) (R. 102).

Moreover, the settlement agreement applies, by its express terms, only to the "***personal injury claims of [Ms. Luna] and/or her minor children***, which resulted in the filing of a lawsuit

by [Ms. Luna] identified as Luna v. Nuyen Civil Action No. 01CA008500." Settlement & Release 1 (R. 44). In the agreement, the parties expressly "acknowledge[d] and agree[d] that this Settlement & Release does not limit or otherwise alter or affect any rights, claims, causes or defenses of the parties in the Landlord Tenant action presently pending in the Superior Court of the District of Columbia identified as Home Champion v. Luna L&T No. 042054-01, and * * * that said L&T action shall continue unhindered, unimpeded, and without any limitation to the causes or defenses asserted therein, notwithstanding the execution of this agreement." Ibid. Nothing in the law prevents parties, as part of a settlement of one case, from specifically agreeing to the continued litigation of related claims in another case, even if those claims might be held to be barred by res judicata in the absence of such an agreement. Cf. Molovinsky v. Monterey Cooperative, Inc., 689 A.2d 531, 533 (D.C. 1996) (rejecting a party's argument that a prior settlement was not a res judicata bar to the litigation of related claims when "the settlement agreement is absolutely silent on any reservation of rights").

Presumably, when he signed the settlement agreement (and acknowledged that he had read and understood it), Mr. Nuyen believed that doing so was in his best interests. After all, the settlement agreement enabled Mr. Nuyen to resolve Ms. Luna's substantial personal-injury claims without a finding of liability against him and for an amount within his insurance policy limits. At the same time, the agreement enabled Mr. Nuyen to continue to press his claims for possession and unpaid rent, subject to Ms. Luna's defenses and counterclaims. In now attempting to avoid that latter provision of the agreement -- one that appears, by its specificity and prominence, to have been central to the parties' bargain -- Mr. Nuyen, not Ms. Luna, is the party seeking "a second bite of the apple." Appellant's Br. 20. For all of the reasons stated above, he is not entitled to it.

C. The Punitive Damages Award Comports With Due Process Principles

Mr. Nuyen finally argues that the superior court's award of $50,000 in punitive damages violates the Due Process Clause. See Appellant's Br. 24-25. As previously explained, because Mr. Nuyen did not appeal the default judgment, his challenge to its punitive damages award is not properly before this Court. The punitive damages award is, in any event, consistent with due process standards.

The Supreme Court has identified "three guideposts" that a reviewing court is to consider in assessing whether a punitive damages award satisfies due process: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages * * * and the civil penalties authorized or imposed in comparable cases." State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).[16] The first of those guideposts is the "most important." Id. at 419. Although Mr. Nuyen focuses his challenge primarily on the second guidepost, all three are satisfied here.

1. Mr. Nuyen's conduct was reprehensible. The Supreme Court has explained that a party's conduct may be sufficiently reprehensible to justify an award of punitive damages if, for example, the conduct "evinced an indifference to or a reckless disregard of the health or safety of others, " if the conduct "involved repeated actions," or if "the target of the conduct had financial

[16] Those standards were articulated in cases in which an appeal was taken from the judgment awarding punitive damages. The Supreme Court has not suggested that the Due Process Clauses excuses a party from its obligation to take a proper appeal from a punitive damages award.

vulnerability." State Farm, 538 U.S. at 418. Mr. Nuyen has engaged in precisely such conduct with respect to Ms. Luna and his other tenants.[17]

As demonstrated by Ms. Luna's sworn statements and the published materials submitted in support of her motion for default judgment, Mr. Nuyen displayed reckless disregard for the health and safety of Ms. Luna and her family. He repeatedly failed to respond to Ms. Luna's requests to correct housing code violations in her apartment. Those violations included missing fire alarms, malfunctioning plumbing, a broken door and window, rat and cockroach infestation, and the deteriorating ceiling that ultimately collapsed on Ms. Luna's daughter. See Answer 2-3; Def.'s Resps. to Pl.'s First Set of Interrogs. 4-5, 11-12, 16-17 (Def.'s Default J. Mot., Exh. FF) (R. 52-53, 59-60, 64-65). Moreover, when Ms. Luna continued to request repairs after the filing of this suit, Mr. Nuyen directed that no repairs were to be made "until [she] start[ed] paying [her] rent directly to him and not the Court." Def.'s Responses to Pl.'s First Set of Interrogs. 5 (Def.'s Default J. Mot, Exh. FF) (R. 53).

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[17] We do not rely here on any claim of "physical as opposed to economic" harm, see State Farm, 538 U.S. at 419, in view of Ms. Luna's settlement of her personal-injury claims. What remained pending in the landlord-tenant action between the parties were, inter alia, Ms. Luna's "counterclaim[s] for a money judgment based on the payment of rent * * * [and] for equitable relief." Super. Ct. L&T R. 5(b); see Answer, Counterclaims and Jury Demand 4-7.

Mr. Nuyen did not argue below, and does not argue here, that courts are without authority to award punitive damages on such "counterclaim[s] for a money judgment" in a landlord-tenant action. As a general matter, this Court has recognized that punitive damages may be awarded on contract-based claims, such as those asserted by Ms. Luna here, that involve a breach of the implied warranty of habitability. See, e.g., Bernstein v. Fernandez, 649 A.2d 1064, 1073 (D.C. 1991) (recognizing that punitive damages are available when the breach "merges with, and assumes the character of, a willful tort") (internal quotation marks omitted) ; Mark Keshishian & Sons, Inc. v. Washington Square, Inc., 414 A.2d 834, 842 (D.C. 1980); Den v. Den, 222 A.2d 647, 648 (D.C. 1966); Brown v. Coates, 102 U.S. App. D.C. 300, 303, 253 F.2d 36, 39 (D.C. Cir. 1958). Alternatively, the court could have awarded a comparable sum against Mr. Nuyen as sanctions "to punish abuses of the judicial process and to deter future abuses." Chevalier v.

On numerous occasions, Mr. Nuyen displayed the same reckless disregard for his other tenants' health and safety. In 2000, for example, the District of Columbia charged Mr. Nuyen with 2,283 counts of housing code violations at two of his apartment buildings in Anacostia; Mr. Nuyen settled those charges by paying a fine and agreeing to sell the buildings. See Sewell Chan, D.C. Landlord Indicted in Federal Lead Crackdown, Washington Post, Mar. 15, 2001, at B-5 (Def.'s Default J. Mot., Exh. F); see also Prepared Statement of Assistant Attorney General Thomas L. Sansonetti before the Subcomm. on Housing and Transportation of the Senate Comm. on Banking, Housing and Urban Affairs, at 4 (June 5, 2002) (Def.'s Default J. Mot., Exh. G) (noting that Mr. Nuyen "appeared on a list of [District] landlords with the most housing code violations"); Marc Fisher, No Repairs, No Respect for Tenants, Washington Post, May 25, 2000, at B-1 (Def.'s Default J. Mot., Exh. U) (describing the conditions in apartment buildings owned and managed by Mr. Nuyen, including broken windows and doors, a broken toilet, broken appliances, leaking faucets, missing smoke detectors, and rodent and insect infestation).

In addition, Mr. Nuyen was charged with federal felony offenses that arose out of his failing to notify residents of Ms. Luna's building and other buildings about lead paint hazards and lying to the government about it. See United States Dep't of Justice, Press Release, Washington-Area Landlord Indicted for Lying About Lead Paint Hazards (March 14, 2001) (Def.'s Default J. Mot., Exh. H). As previously noted, Mr. Nuyen pleaded guilty to certain of those charges. In his plea, Mr. Nuyen admitted, among other things, that "even though he had been informed that there were lead paint hazards in one of his buildings, he failed to notify

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Moon, 576 A.2d 722, 724 (D.C. 1990) (holding that sanctions could be awarded for those purposes in a landlord-tenant action).

tenants." United States Environmental Protection Agency, Press Release, Landlord Sentenced for Lying About Lead Paint Hazards (Mar. 22, 2002) (Def.'s Default J. Mot., Exh. J.).

Not only did Mr. Nuyen engage in "repeated actions" evincing "an indifference to or a reckless disregard of the health or safety of others," but he also directed those actions against victims with "financial vulnerability." State Farm, 538 U.S. at 418. Like Ms. Luna, "[m]ost of [Mr.] Nuyen's tenants are and were poor Latinos." Ruben Castaneda, Landlord Gets 2 Years In Probe of Lead Paint, supra; see United States Dep't of Justice, Press Release, Washington-Area Landlord Indicted, supra (noting that Mr. Nuyen owned and/or managed 15 "low-income" apartment buildings in the District of Columbia and suburban Maryland). Federal prosecutors thus characterized Mr. Nuyen in their court filings as the very "archetype of a 'slumlord' because he failed to provide a clean and safe environment for tenants and denied responsibility for living conditions at his buildings." Ruben Casteneda, Landlord Gets 2 Years In Probe of Lead Paint, supra.

2. The punitive damages award is not excessive relative to Ms. Luna's actual or potential harm. Although the Supreme Court in State Farm "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed" relative to actual damages, the Court did caution that due process would rarely be satisfied by "awards exceeding a single-digit ratio * * * to a significant degree." 538 U.S. at 425. The Court added that, when "a particularly egregious act has resulted in only a small amount of economic damages," a relatively greater ratio of punitive to actual damages may be permissible. Ibid. (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).

Here, the ratio of punitive damages to actual damages is approximately 7.6 to 1, and thus is comfortably within the single-digit guidepost. Ms. Luna's actual damages consist of the

$6,600 rent refund that she received as a result of the default judgment -- $4,000 in rent that she had paid to Mr. Nuyen directly and an additional $2,600 in rent that she had paid into the court registry. Mr. Nuyen errs in omitting the $2,600 from his calculations. The $4,000 and the $2,600 equally represent amounts that Ms. Luna was erroneously charged by Mr. Nuyen for an apartment with substantial housing code violations. In any event, even if the ratio were the 12.5 to 1 that Mr. Nuyen claims, that ratio would not offend due process, because Mr. Nuyen's conduct was "particularly egregious," Ms. Luna's economic damages were modest, and the single-digit ratio was not exceeded "to a significant degree." State Farm, 538 U.S. at 425.

3. The punitive damage award is not excessive in light of relevant civil penalties. The civil penalties that could be imposed under District of Columbia law on a landlord who commits multiple repeated violations of the housing code could readily exceed $50,000. For example, the civil fine for a single failure to maintain a fire alarm system or smoke detector, one of the violations identified by Ms. Luna in her answer, ranges from $500 for a first violation to $4,000 for a fourth or subsequent violation. 16 D.C.M.R. §§ 3201.1(b), 3226.1(gg) and (jj). The same civil fines apply to a failure to supply sufficient heat, as Ms. Luna alleged in her separate complaint. 16 D.C.M.R. §§ 3201.1(b), 2336.1(l) and (n). For other violations identified by Ms. Luna, such as "renting or offering to rent a habitation that is not clean, safe, and free of vermin and rodents," "failure to comply with a requirement concerning plumbing facilities," or "permitting to exist on premises a window * * * that does not completely exclude rain and substantially exclude wind," the civil fines range from $100 for a first violation to $800 for a fourth or subsequent violation. 16 D.C.M.R. §§ 3201.1(c), 3226.2(b), (bb), and (ii). For a landlord with many rental units, many of which contain at least one housing code violation, the civil penalties could quickly add up to $50,000 or more. See Sewell Chan, D.C. Landlord

Indicted in Federal Lead Crackdown, supra (noting that Mr. Nuyen was charged in 2000 with 2,283 housing code violations involving only two of his approximately 15 low-income rental buildings).

In sum, even if the default judgment, including its punitive damages award, were properly before the Court, Mr. Nuyen has not identified any valid basis to overturn it, particularly in the current posture of the case. Mr. Nuyen had ample opportunity to litigate this case on the merits. He forfeited that opportunity though his own neglect of the case, including his failure to make arrangements for its litigation during his extended imprisonment. There is nothing inequitable in the superior court's decision to bring the case to closure.

CONCLUSION

The judgment of the superior court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellee to be delivered by first-class mail, postage prepaid, the 29th day of October 2004, to:

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