May 17, 2019

Via electronic mail

Laura M.L. Wait
Associate General Counsel
Superior Court of the District of Columbia
500 Indiana Avenue, N.W., Room 6715
Washington, D.C. 20001
Laura.Wait@dcsc.gov

Re: Proposed Amendments to the Superior Court Rules of Procedure for the Landlord and Tenant Branch

Dear Ms. Wait:

Our organizations – Bread for the City, the D.C. Bar Pro Bono Center, D.C. Law Students in Court, the Legal Aid Society of the District of Columbia, Legal Counsel for the Elderly, and the Neighborhood Legal Services Program – write to offer our comments and recommendations on the proposed amendments to the Superior Court Rules of Procedure for the Landlord and Tenant Branch published on April 10, 2019. Our organizations receive funding from the D.C. Bar Foundation under the Civil Legal Counsel Projects Program to provide legal information, advice, brief services, and limited and full representation to low-income tenants facing eviction in the Landlord and Tenant Branch. Collectively, we represent thousands of low-income tenants in the District each year. We believe the proposed amendments would benefit from further clarification and revision in certain respects, described in detail below.[1]

Rule 3-I

Rule 3-I bars a landlord or landlord's agent from filing a complaint for possession based on nonpayment of rent if the property is subject to a court-ordered receivership. However, as written, Rule 3-I does not address what happens if a similar complaint is pending at the time a receiver is appointed. We suggest adding a new section to Rule 3-I to clarify that landlords may not proceed with a pending nonpayment action once a receiver has been appointed without specific authorization by court order in the receivership action:

> PENDING ACTIONS. No owner or owner's agent may maintain a complaint for possession of real property based, in whole or in part, on nonpayment of rent if the property is subject to a court-ordered receivership under D.C. Code §§ 34-2301 to -2306, 42-3301 to -3307, or 42-3651.01 to -.08 (2012 Repl. & 2019

[1] We have focused the majority of our comments on specific changes to the text of various Rules provisions. Where the text of a Rule is changed, the Court should consider whether any changes to the accompanying comment are either necessary or helpful.

Supp.), unless authorized by court order in the receivership action. Where such a complaint is pending when a receiver is appointed, the owner or owner's agent must notify the court, and the clerk will schedule a status hearing to address the application of this rule.[2]

Rule 3-II

Proposed new Rule 3-II provides procedures for joining a third party to a nonpayment of rent case where the landlord or tenant asserts that a third party is responsible for all or some of the unpaid rent. The new Rule addresses a situation that arises relatively frequently in nonpayment of rent cases and provides helpful guidance for the parties and the Court. We suggest three changes below.

1) **Clarify which subparts of Civil Rule 4 apply for service**

Proposed Rule 3-II requires that the person or entity to be joined be served in accordance with Civil Rule 4. We are concerned that this language suggests that all subparts of Civil Rule 4 apply, including, for example, those related to the form of the summons and complaint and the time for filing the affidavit of service. We do not believe this is the Court's intent, and it would not be consistent with current practice when third parties are joined to pending actions in the Branch. We suggest changing this portion of Rule 3-II to focus on the subparts of Civil Rule 4 that address the mechanics of service itself:

> The person or entity to be joined must be served in accordance with Civil Rule 4(c)(2)-(6), (e)-(k).

Alternatively, the Court could add language making clear that the portions of Civil Rule 4 that are inconsistent with the Landlord and Tenant Branch Rules do not apply:

> The person or entity to be joined must be served in accordance with Civil Rule 4, except where inconsistent with these rules.

2) **Allow additional time for parties to file a motion for joinder**

Proposed Rule 3-II requires that a party filing a motion for joinder do so by the initial hearing date or seek leave of Court to extend this deadline for good cause. Many tenants meet with an attorney for the first time on or even after the initial hearing date and are likely to need assistance from an attorney to identify the need for a motion for joinder and prepare one. Moreover, we see many situations in which the parties are not able to identify whether a third party is responsible

[2] In our proposed text, deletions are struck through and additions are underlined.

for part of the rent owed or make sufficient factual allegations to file a motion for joinder until later in the case, sometimes even after discovery is exchanged. We suggest allowing more time:

> A party seeking joinder must file a written motion no later than ~~the time for appearance of the existing defendant stated in the summons~~ 14 days before trial if the case is scheduled for trial in the Landlord and Tenant Branch, or 14 days after the close of discovery if the case is certified to the Civil Actions Branch for jury trial, or within such additional time as the court may allow for good cause.

3) Clarify that joinder still is permitted in other circumstances

Finally, we suggest adding a new section to Rule 3-II to make clear that parties remain free to file a motion for joinder of a necessary party pursuant to Civil Rule 19 in other circumstances. We are concerned that Rule 3-II otherwise could be read as foreclosing this possibility, and therefore suggest a clarifying amendment:

> (d) Nothing in this rule should be construed to limit the parties' ability to file a motion to join a person or entity needed for just adjudication in other circumstances permitted by Civil Rule 19.

Rule 4

1) Allow dismissal with prejudice in certain circumstances

Rule 4 now includes a new requirement that the clerk dismiss a complaint without prejudice if the landlord does not file an affidavit of service six days before the initial hearing or receive leave of Court to extend this deadline. We are concerned this may result in certain landlords filing repeated complaints against tenants, only to have the complaints dismissed for failure to comply with the new requirement. We suggest adding language that would allow the Court to dismiss a complaint with prejudice where appropriate:

> (4) Dismissal. The plaintiff's failure to comply with the requirements of this rule will result in the dismissal without prejudice of the complaint. The clerk will enter the dismissal and serve notice on all the parties. If the plaintiff refiles a complaint with the same claim and again fails to comply with the requirements of this rule, the case will be set for a hearing at which time the plaintiff may present good cause as to why the complaint should not be dismissed with prejudice.

2) Add a reference to *Southern Hills Partnership v. Anderson* to the comment

We also suggest adding to the comment a reference to the recent D.C. Court of Appeals decision in *Southern Hills Limited Partnership v. Anderson*, 179 A.3d 297 (D.C. 2018), which provides

helpful guidance for situations in which the landlord has reason to believe service will be ineffective, for example where the tenant is absent from the unit:

> This rule requires that the plaintiff mail to the defendant a copy of the summons and complaint when service is made by posting pursuant to D.C. Code 2001, § 16-1502. *See Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982). This requirement is not intended to excuse the plaintiff's obligation to make a "diligent and conscientious effort" to secure personal or substitute service before resorting to service by posting. *See, e.g., Parker v. Frank Emmet Real Estate*, 451 A.2d 62 (D.C. App. 1982). Where the landlord has reason to believe service will be ineffective – for example, because the tenant is not currently staying at the unit – the landlord must use reasonable efforts to locate the tenant prior to posting. *See Southern Hills Limited Partnership v. Anderson*, 179 A.3d 297 (D.C. 2018).

Rule 5

1) **Allow more time to file a written counterclaim in a bench trial case**

Rule 5 now includes a new requirement that a defendant filing a written counterclaim do so at least 14 days before trial if the case is scheduled for a bench trial in the Landlord and Tenant Branch. Because trials in the Landlord and Tenant Branch often are scheduled on a very tight timeframe, we suggest shortening this time period to 7 days before trial:

> A defendant may file a written counterclaim at any time at least ~~14~~7 days before trial if the case is scheduled for trial in the Landlord and Tenant Branch, unless the deadline is extended by the Court for good cause shown.

Rule 7

Rule 7 now includes a mechanism for a party to request a continuance of the initial hearing date by appearing in Court in advance and filing an application to be heard the same day. This is an important protection for unrepresented tenants, too many of whom receive very little notice of the first court date in their case, as well as unrepresented landlords who may need to reschedule the initial hearing date. Although Rule 7 currently provides for the continuance of an initial hearing, such motions too often are not decided until the initial hearing date and in the requesting party's absence. Inevitably, this results in either wasted time and expense to parties and their counsel who have appeared, or in the entry of a default against diligent but absent parties.

We hope that this new application process will advance the interests of all parties by providing a definitive ruling on whether the initial hearing will be continued prior to the first court date. This new process also should alleviate some of the burdens on the clerk's office.

Rule 10

Rule 10 now specifies that parties can serve up to 10 requests for production of documents, rather than requesting 10 documents, in cases certified to the Civil Actions Branch for a trial by jury. This is a much-needed clarification that conforms the rule to current practice. We suggest revising the language of the comment to make clear this is a clarification:

> Section (d) has been amended to ~~provide~~ clarify that 10 requests for production are permitted, regardless of the number of responsive documents to those requests.

Rule 11

1) **Clarify that the morning announcement must include a reference to free legal services available in court**

By longstanding practice, the morning announcement delivered in the Landlord and Tenant Branch contains helpful information about free legal services available in court that day. We suggest revising Rule 11 to make clear that this information should be included:

> (a) BEGINNING OF SESSIONS. At the beginning of each session, the court must provide an introductory description of the procedures and legal framework governing cases brought in the Landlord and Tenant Branch and the availability of free legal services for self-represented litigants.

2) **Clarify the process for requesting a trial by jury and granting continuances of initial hearings**

Rule 11 currently places a heavy emphasis on setting cases for a non-jury trial at the initial hearing, stating the Court "must" do so with limited exceptions. The Rule also is not clear that any continuances granted will reserve all rights to both parties. We suggest several revisions to address these two issues.

First, Rule 11 should specify that the Court inform any unrepresented parties of their right to request a jury trial. The Rule also should make clear that the Court must either schedule the case for a non-jury trial or certify the case to the Civil Actions Branch where a jury trial is requested, noting both options.

Second, the Rule should specify that both parties automatically keep all rights when cases are continued. Under current practice, a tenant seeking a continuance pursuant to Rule 11(b)(5) in order to prepare a written answer and jury demand must specify that the continuance is "with all rights reserved" or risk losing rights, including the very right to a jury trial. Likewise, unrepresented landlords facing such a continuance may lose their right to a full protective order

if these words are not stated on the record. This current practice too easily becomes a trap for the unwary, unrepresented party and does not serve any particular interest.

Finally, the Rule should address the reality that many tenants seek a continuance to find counsel, unsure if they will file a jury demand or not. We suggest adding language clarifying that continuances may be granted to seek counsel:

> (b)(5) Setting a Case for Trial. If the case remains unresolved, the court must, after informing any self-represented parties of their right to demand a jury trial, set a non-jury trial date or certify the case to the Civil Actions Branch if either party files a demand for a jury trial., ~~or i~~ In the case of a defendant wishing to seek representation or request a jury trial under Rule 6, the court may continue the matter for two weeks for the filing of a verified answer, except for good cause. Unless otherwise stated by the court, any continuance granted under this rule will reserve all rights to both parties.

3) Revise the prescribed colloquy for unrepresented tenants in nonpayment of rent cases

Rule 11 prescribes a colloquy that a judge sitting in the Landlord and Tenant Branch must follow when an unrepresented tenant is sued for nonpayment of rent. Specifically, the Rule instructs the judge to inquire about the tenant's reasons for not paying the rent.

A tenant's stated reason for not paying the rent is not a legal defense or legally relevant. A tenant who withholds rent based on asserted housing code violations still may be liable to pay the missing funds if that potential defense fails. Likewise, a tenant who fails to pay for some other reason but has housing code violations may have a defense to nonpayment. The key questions are whether housing code violations existed, whether the landlord had notice, and whether the landlord made timely repairs.

We are concerned that inquiring about the reasons a tenant did not pay can lead to the entry of a confessed judgment, even when a tenant may have legitimate defenses, because it inevitably may lead to a tenant responding with legally irrelevant facts. Instead, we suggest that the judge engage in a neutral inquiry intended to elicit potential defenses, consistent with Rule 2.6 of the Code of Judicial Conduct:

> (b)(4)…
> At the initial hearing, the court must:
> …
> (D) in cases involving self-represented defendants alleged to be in arrears in the payment of rent, specifically ask the defendant:

(i) whether the defendant failed to pay the rental amount alleged to be due by the plaintiff; and
(ii) if the rent has not been paid, ask the defendant~~'s reasons for not paying it~~ questions intended to elicit possible defenses, including whether the defendant contests the amount of rent or other charges due and whether the tenant alleges housing code violations at the property.

4) Delete language requiring the clerk to enter default

As written, Rule 11(b)(2) requires the clerk to enter a default in all cases where the plaintiff is present but the defendant is not, there is good service, and the complaint alleges facts that would entitle the plaintiff to possession of the premises. Oftentimes tenants are not present at the initial hearing because of unexpected emergencies, delays getting to the courthouse, or simply having stepped out of the courtroom momentarily. We are concerned that the rule requires the clerk to enter default even when the Court is aware of information that would warrant giving the tenant additional time to appear. We suggest the following clarification:

Rule 11(b)(2) Entry of Default. The clerk ~~must~~ may enter a default against the defendant in any case scheduled for an initial hearing if…

Rule 12-I

Rule 12-I now contains language specifying that a protective order must be paid to the registry of the Court. While we understand the reason for this clarification, we also believe it is appropriate to acknowledge situations in which a tenant may be entitled to pay a protective order by other means as a reasonable accommodation for a disability. We suggest adding language to the comment noting this possibility:

While the rule specifies that protective order payments must be made directly to the registry of the court, a tenant with a disability nonetheless may request to make payments by other means as a reasonable accommodation for that disability.

Rule 13

1) Require notices of motion hearing dates to describe the motion

We are concerned that the Court's new procedures for sending a separate notice of the motion hearing date are likely to result in significant confusion for unrepresented parties, because the notice is sent separate from the underlying motion and does not reference the type of motion filed. Court notices that fail to "promote the understanding of persons who are unable to obtain counsel and are left to navigate the court system on their own" are inconsistent with the Code of Judicial Conduct and the Strategic Plan of the District of Columbia Courts. *Wylie v. Glenncrest*, 143 A.3d 73, 86 n. 20 (D.C. App. 2016). We understand that the current Courtview system has

various technical limitations that make it difficult to create a more descriptive notice. We nonetheless urge the Court to continue to work on this issue, and to amend Rule 13 to require that the motion notice include the title of the motion:

> (b)(2) Notice. The notice of motion hearing must specify the date, time, and location of the hearing and the title of the motion.

2) Ensure that applications for a temporary restraining order are heard in a timely manner[3]

We continue to have concerns that applications for temporary restraining orders to address emergency housing conditions are not always heard in a timely manner, and that such applications are not treated consistently. We believe the Court and the parties would benefit from a more uniform approach in which such applications are treated like the new applications for a continuance and heard the same day they are filed. This does not mean, of course, that a litigant would be entitled to immediate relief. But it would ensure that the decision to deny or delay the granting of relief is based on hearing from one or both parties. This approach also would be consistent with the approach taken in the Civil Actions Branch, where applications for temporary restraining order are heard by the Judge-in-Chambers on an expedited basis. We suggest adding the following language to an appropriate section in Rule 13:

> The court must hold a hearing on an application for a temporary restraining order on the day that the application is filed. At the hearing, the court may grant or deny the application or may continue the hearing for a reasonable period of time to permit the parties to prepare arguments and evidence for presentation to the court.

Rule 14

Rule 14 currently allows a party to proceed with presenting ex parte proof on the same day that a default is entered. To ensure that parties have an adequate opportunity to

[3] We understand that the Branch recently has begun referring to requests for temporary restraining orders as "motions," not "applications," and requiring parties to pay a motion filing fee or seek *in forma pauperis* status. This is inconsistent with Civil Rule 12-I and the comment to Civil Rule 65, which continue to refer to these requests as "applications," and we believe strongly that the same approach should be taken in the Landlord and Tenant Branch. Requiring tenants with emergency situations to pay a filing fee or wait to have their *in forma pauperis* status approved does not enhance access to justice.

contest a case on the merits, we suggest changing this Rule to require that ex parte proof be presented at a future hearing date, following notice to the other party:[4]

> (c)(2)(C) Procedure for Presenting Ex Parte Proof. In cases requiring the presentation of ex parte proof, the plaintiff must appear before the judge on the day that the default is entered ~~to present ex parte proof or~~ to schedule a hearing for a later date for the presentation of ex parte proof. If the presentation of ex parte proof is scheduled for another date, the clerk must send written notice to all parties.

Rule 14-II

The Rental Housing Late Fee Fairness Amendment Act of 2017, D.C. Law 21-0172, D.C. Code § § 42–3505.31(c)(4), bars a landlord from evicting a tenant for nonpayment of a late fee. The Court already has issued guidance prohibiting landlords from including late fees in the redemption amount. We suggest adding a comment to Rule 14-II noting the law and its import:

> Under the Rental Housing Late Fee Fairness Amendment Act of 2017, D.C. Law 21-0172, D.C. Code § § 42–3505.31(c)(4), the redemption amount may not include any late fees.

Rule 16

We have concerns about the removal of the two-day waiting period between entry of judgment and the issuance of a writ. The comment to Rule 16 indicates that the two-day waiting period "was deleted as unnecessary." We believe the two-day period is, in fact, necessary to protect a tenant's right to redeem in nonpayment cases. The issuance of a writ increases the redemption amount. The two-day waiting time ensures a brief period in which a tenant may redeem a tenancy without additional fees once a judgment is entered. By allowing a writ to issue immediately, the amended Rule would allow for a near-immediate increase in the redemption amount upon entry of judgment. This is a *de facto* penalty imposed on any tenant who has good-faith defenses and fights a case to judgment rather than redeeming prior to trial. We suggest leaving the two-day waiting period in Rule 16 as is.

[4] This revision would be consistent with DRB Rule 55(b)(1)(A), which provides that a party against whom a default has been entered must be provided with notice before a hearing on a motion for entry of a default judgment or order.

Other Issues to be Considered

Some of our comments above reflect our suggestions for additional revisions to the Rules beyond those considered by the Court – for example, our suggested revisions to Rule 11. We understand the Court may feel these suggestions should be addressed in future Rules revisions, after further discussion between the Court and stakeholders.

We believe there are other issues that the Court should consider in future amendments to the Rules. For example, a perennial problem for represented tenants is an expectation by some judges that they will attend court hearings with their counsel, even when the same standard is not applied to landlords. Both sides would benefit from clarification about which proceedings require the parties to attend, such as mediation and the pretrial conference.

Another issue the Court should consider is the handling of tenants who lack capacity. While Civil Rule 17(c)(2) is incorporated in the Branch, current practices are inconsistent when it comes to applying the Rule to incapacitated tenants. We recommend clarifying that if a tenant without capacity has a case manager or equivalent non-attorney advocate, then that party can request that the Court appoint a guardian ad litem. Additionally, if there is a pending guardianship petition filed with the Probate Court, then the Landlord and Tenant Branch matter should be stayed until after the guardianship hearing and the appointment of a guardian, if applicable.

We also believe all parties benefited from Rule 11-I, which specified the role of the Interview & Judgment Officer and has been deleted in the current revision. We understand the Court intends to replace this Rule with internal guidance. We hope this guidance will be made public and that stakeholders will have an opportunity to provide input.

Because these and other issues raise ongoing concerns, we believe – joined by many of our opposing counsel from the landlord bar – that it is critical that the Court continue to convene both the Landlord Tenant Working Group and the Landlord and Tenant Advisory Rules Subcommittee. All parties and the Court benefit from maintaining an open dialogue about Branch operations, particularly given the numerous challenges that are somewhat endemic to a high-volume, fast-paced docket. We likewise believe that other important issues beyond the ambit of these current rules – such as the use of magistrate judges in the Branch and the length of the rotation both of magistrate judges and associate judges still hearing these cases – should be the subject of continued dialogue.

We are truly appreciative of the Court's continued commitment to examining and improving the way it metes out justice in its high-volume courts, and we look forward to continuing that dialogue with the Court.

Sincerely yours,

BREAD FOR THE CITY
Rebecca Lindhurst, Managing Attorney

D.C. BAR PRO BONO CENTER
Rebecca K. Troth, Executive Director
Gabriella Lewis-White, Managing Attorney

D.C. LAW STUDENTS IN COURT
Lucy Newton, Co-Director, Eviction Defense Services
David Yellin, Staff Attorney

THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA
Eric S. Angel, Executive Director
Beth Mellen Harrison, Supervising Attorney & Eviction Defense Project Director

LEGAL COUNSEL FOR THE ELDERLY
Jennifer Berger, Managing Attorney
Dan Palchick, Senior Staff Attorney

NEIGHBORHOOD LEGAL SERVICES PROGRAM
Lori R. Leibowitz, Managing Attorney