No. 11-CV-1189

DISTRICT OF COLUMBIA COURT OF APPEALS

KAMENKO PAJIC,

Appellant

v.

FOOTE PROPERTIES, L.L.C.,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE TRIAL COURT'S ENFORCEMENT OF THE FEE-SHIFTING CLAUSE IN THE LEASE AGREEMENT WAS PLAIN ERROR AND SHOULD BE REVERSED.

A. 14 DCMR § 304.4 prohibits the enforcement of fee-shifting clauses in residential lease agreements.

Foote does not dispute that, in the District of Columbia, residential leases must comply with the District's housing regulations, including 14 DCMR § 304.4. *See* Foote Br. 4-9. Instead, Foote argues that the award of attorney's fees was appropriate in this case because Section 304.4 applies only while there is an *ongoing* tenancy. *See* Foote Br. 6-7. In other words, as soon as a tenant returns possession of the rental unit, he forfeits any protections he might otherwise have enjoyed under Section 304.4. This argument is meritless.

There is no textual or case law support for Foote's characterization of the regulation. The plain language of 14 DCMR § 304.4 prohibits any provision in a lease agreement "requiring that the tenant pay the owner's court costs or legal fees." And under 14 DCMR § 304.1, prohibited lease provisions are "void and unenforceable." The regulation applies regardless of the procedural context; a lease provision that is "void and unenforceable" cannot be enforced at any time. It makes no difference whether the enforcement action commences while a tenant is in possession or after he moves out.

Foote nonetheless argues that after he relocates, the tenant is no longer a tenant. True enough, but the regulation governs the legal effect of the lease provision when the lease is signed – *i.e.*, when the parties become landlord and tenant.[1] Terminating the tenancy does not change

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[1] The way in which the terms "tenant" and "owner" are used throughout the housing regulations makes clear that those terms refer to the relationship created between the parties

(footnote continued on next page . . .)

the parties' relationship under the contract, nor does it somehow make valid an unenforceable provision. Put differently, Foote is suing Pajic for rent and fees in his role as "Tenant" under the lease, not under a post-occupancy agreement newly created between a non-tenant and a non-landlord. The language of these regulations is unambiguous and effect must be given to its plain meaning. *See BSA 77 P St. LLC v. Hawkins*, 983 A.2d 988, 995 (D.C. 2009).

Foote has not provided any legal authority for its interpretation of Section 304.4. The only "authority" that Foote cites is Kenneth Loewinger's handbook on landlord-tenant law in the District of Columbia.[2] *See* Foote Br. 6. However, Loewinger's handbook itself offers no legal support for his characterization of the law. *See* Kenneth J. Loewinger & R.J. Turner, D.C. Landlord-Tenant Law § 1.2p (1986) (citing no authority); *see also* Kenneth J. Loewinger, Landlord-Tenant Law and Practice in the District of Columbia § 1.3p (1998) (same). The book's bare assertion that Section 304.4 offers no protection to tenants in post-possessory litigation is

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when they sign the lease, not to whether the regulation applies post-tenancy. The security deposit rules, for example, use those terms despite applying, by definition, to cases arising after the tenancy is over. *See, e.g.*, 14 DCMR § 309.1 (1) ("Within forty-five (45) days *after* the termination of the tenancy, *the owner* shall . . . [t]ender payment to *the tenant*, without demand, any security deposit." (emphases added)); *id.* § 309.1 (2) ("Within forty-five (45) days *after* termination of the tenancy *the owner* shall . . . [n]otify *the tenant* in writing . . . of *the owner's* intention to withhold [the security deposit]." (emphases added)). Other regulations use the terms similarly. *See id.* § 2206.4 (where the owner of a Rental Inclusionary Development unit "becomes aware that the *Tenant has vacated* . . . the Inclusionary Unit" the owner must file a Notice of Availability with the Department of Housing and Community Development (emphasis added)); *id.* § 4212.7 (e) (following the substantial rehabilitation of a rental unit, "the *tenants* [who were forced to vacate to accommodate the rehabilitation] have the right to re-rent their *former* rental units at the newly authorized rent ceiling" (emphases added)); *id.* § 1928.2 ("*A tenant evicted* through judicial means . . . shall not be eligible for [rental] assistance after the date of eviction." (emphasis added)).

[2] As noted in Pajic's opening brief, Loewinger was not a neutral authority regarding landlord-tenant law. Indeed, even his own law firm's advertising for the treatise describes it as "a book designed for attorneys, property management companies and landlords." *See* Firm Specializations, Loewinger Brand, PLLC, www.loewinger-brand.net (last visited June 19, 2012).

advocacy, not authority. Indeed, in the 26 years since Mr. Loewinger first published his handbook, there has not been a single case in which this Court has endorsed his characterization of Section 304.4 or otherwise cited Loewinger as authoritative on any point of landlord-tenant law.[3]

Foote's public policy arguments fare no better. In his opening brief, Mr. Pajic explained that, if landlords are allowed to contract for shifting attorney's fees, they would use these clauses to chill tenants from legally withholding rent or taking other action to force repairs. *See* Pajic Br. 14. Foote never seriously disputes any of these points, but instead suggests that these concerns are trumped by a need to "enhance[] judicial efficiency" by "encourag[ing] a tenant to raise disputes with a landlord during the tenancy in landlord-tenant court." Foote Br. 7. Under District of Columbia law, however, tenants do not have that option. Only a landlord, and not a tenant, can bring suit in Landlord-Tenant Court. *See* Super. Ct. Civ. R. (L&T) 3. In fact, as noted in the opening brief, it is *Foote's* construction of Section 304.4 that would harm "judicial efficiency" by encouraging landlords to split their lawsuits for possession and rent whenever possible. *See* Pajic Opening Br. 15. Indeed, while Foote criticizes Mr. Pajic for not "tak[ing] his dispute with [Foote] to landlord-tenant court during the course of his tenancy," Foote Br. 7, which would have been impossible under the Landlord-Tenant Court's rules, it was *Foote* who, for reasons not apparent from the record, chose not to sue Mr. Pajic for eviction – despite

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[3] Foote's assertion that this Court cited Loewinger as "reliable authority" in *Canada v. Management Partnership, Inc.*, 618 A.2d 715, 720 n.15 (D.C. 1993), is misleading. *See* Foote Br. 7. In *Canada*, this Court mentioned (in a footnote) that the landlord had not pressed Loewinger's argument that Section 304.4 applies only to actions for possession of real property, and, therefore, the Court specifically declined to address whether Loewinger's interpretation was correct. *See Canada*, 618 A.2d at 720 n. 15.

claiming he went months without paying rent – and waited until after the tenancy to sue for damages.[4]

Foote's argument that Section 304.4 does not apply in this case because the fee shifting provision in its standard lease agreement is "conditional," *see* Foote Br. 8-9, is also without merit. Foote argues that the fee-shifting provision is conditional because it applies only "'[s]hould it become necessary for Landlord to employ an attorney'" to enforce its rights under the lease agreement. *Id.* at 8. As noted in Mr. Pajic's opening brief, however, Foote's "condition" would apply to all fee-shifting terms, because if the landlord never hires an attorney, there will be no fees to shift to the tenant. *See* Pajic Opening Br. 16-17. Moreover, because Foote is an LLC, it must be represented by counsel to pursue a lawsuit in the Civil Division or the Landlord-Tenant Branch. *See* Super. Ct. Civ. R. (L&T) 9 (b); Super. Ct. Civ. R. 101 (a)(2); *Wallasey Tenants Ass'n v. Varner*, 982 A.2d 1135, 1137 (D.C. 2006) (characterizing an LLC as a form of corporation). To enforce this lease, therefore, it would always be "necessary for Landlord to employ an attorney." A condition that exists in all circumstances is not, in fact, a condition.

Canada v. Management Partnership, Inc., 618 A.2d 715 (D.C. 1993), does not offer any support to Foote's position. Foote contends that if the Court in *Canada* had disagreed with the landlord's assertion that the fee-shifting agreement in that case was conditional, "it would have

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[4] Foote's sweeping claim that it is good public policy to "encourage tenants to pay their rent while they remain tenants" – regardless of any housing code violations – also runs counter to D.C. law. *See* Foote Br. 7. As this Court and the D.C. Circuit have long recognized, tenants have the legal right to withhold rent in response to housing code violations, which in turn encourages landlords' compliance with the housing code. *See Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970); *Winchester Mgmt. Corp. v. Staten*, 361 A.2d 187, 191 n.13 (D.C. 1976).

said so." Foote Br. 8. Not so. In *Canada*, the landlord itself had asserted at trial that the fee-shifting language was conditional, and the Court had no reason to force a different interpretation on the parties on appeal – particularly where neither party argued for one. Indeed, the Court could not have been clearer that it was simply taking the landlord's characterization of its own lease agreement at face value, and not expressing any opinion on whether the fee-shifting language was actually "conditional" for purposes of Section 304.4. *See Canada*, 618 A.2d at 719 ("as [the] landlord reads its lease clause . . ."); *id.* at 719 n.12 ("As we understand it, the landlord's interpretation of the clause . . ."); *id.* at 719 ("the landlord's own assertion that the lease provision allows only those attorney's fees that may be optionally awarded by a court . . . defeats landlord's argument"); *id.* ("We need not resolve this dispute [*i.e.*, the applicability of Section 304.4] to determine this appeal.").

Finally, Foote's argument that Section 304.4 does not preclude the court from awarding legal fees against a tenant "'in appropriate circumstances,'" *see* Foote Br. 9, is a red herring. The Superior Court did not rely on this clause of Section 304.4, nor did Foote advocate it. The sole basis for the court's award of attorneys fees was the fee-shifting provision in the lease agreement, which under Section 304.4 was clearly unenforceable. *See* Order, Aug. 18, 2011, at 4-5 (A513-14); Second Order, Aug. 18, 2011, at 3 (A520). Accordingly, the question of whether the court might have been able to award attorney's fees on some other basis that was never argued or considered is irrelevant. *See McClintic v. McClintic*, 39 A.3d 1274, 1281 n.4 (D.C. 2012) (declining to consider whether a fee award not authorized by statute could be justified as an exercise of inherent powers, because neither the party seeking the fees nor the trial court had relied on that basis for the award).

B. The trial court's award of attorney's fees was plain error.

Separate from its argument on the merits, Foote asks that this Court abstain from addressing the issue of attorney's fees because Mr. Pajic did not argue Section 304.4 below. *See* Foote Br. 4. However, as this Court has noted, "'[t]he principle that 'normally' an argument not raised in the trial court is waived on appeal is . . . one of discretion rather than jurisdiction,' especially if the 'issue is purely one of law.'" *McClintic*, 39 A.3d at 1277 n.1 (quoting *District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 34 n.3 (D.C. 2001)). This is all the more true in this case, where a decision upholding the enforcement of a fee shifting provision would chill tenants who are faced with uncorrected housing code violations from asserting their legal rights. None of Foote's arguments to the contrary has merit.

First, Foote argues that it would not be unjust for this Court to find this issue waived, because, although Mr. Pajic was a *pro se* defendant, he was "far from . . . unsophisticated" and "often cited to D.C. law" before the Superior Court. *See* Foote Br. 5. But even the most educated lay defendant is not the same as, nor a substitute for, competent counsel. *See Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."); *United States v. Spencer*, 439 F.2d 1047, 1051 (2d. Cir. 1971) ("It seems to us that no matter how intelligent or educated a layman might be, he lacks the skill and knowledge to defend himself adequately."). This is especially true in

landlord-tenant law, with its many complexities.[5] A self-taught lay defendant is no substitute for trained legal counsel.

Second, Foote argues that the absolute and relative size of the attorney's fee award – which was more than five times the amount of damages awarded – is irrelevant. *See* Foote Br. 5. But the disproportionate amount of the award goes to the magnitude of the error, the potential for injustice, and the need for this court to decide the issue. *See Fairman v. District of Columbia*, 934 A.2d 438, 445-46 (D.C. 2007) (holding that the Court may address issues not raised below where necessary to prevent a "miscarriage of justice apparent from the record").

Finally, Foote argues that there was no "plain" error because Loewinger's interpretation of Section 304.4 demonstrates that "the rule is subject to [multiple] interpretations." *See* Foote Br. 7. But every statutory interpretation, even those that this or other courts deem unambiguously wrong, has an advocate. That Foote or Loewinger has advanced an interpretation that runs contrary to the plain language of Section 304.4 does not mean that the regulation is ambiguous and does not preclude a conclusion that the award of attorney's fees was plain error. *See Stamenich v. Markovic*, 462 A.2d 452, 456 (D.C. 1983) ("Contracts are not rendered ambiguous by the mere fact that the parties do not agree upon their proper construction."); *Tippett v. Daly*, 964 A.2d 606, 612-13 (D.C. 2009) ("[T]he fact that the parties

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[5] *See, e.g., Winchester Van Buren Tenants Ass'n v. District of Columbia Rental Hous. Comm'n*, 550 A.2d 51, 51-52 (D.C. 1988) ("Judges in this city who are called upon to decide landlord and tenant controversies . . . must accustom themselves to encounters with the esoteric and the arcane. . . . ").

Indeed, even Loewinger's treatise observes that "Even if not required, [having a lawyer in a landlord-tenant dispute] is a good idea. The judicial system is specialized . . . [and] [e]ven a law student or young attorney is going to know a lot more about the 'system' than a lay person and what one does not know that the other party's lawyer does can be harmful and cost a lot of money." Kenneth J. Loewinger, Landlord-Tenant Law and Practice in the District of Columbia § 5.2 (1998).

(or judges) disagree about the meaning of the statute does not render it ambiguous."), *vacated for reh'g en banc by*, 973 A.2d 691 (D.C. 2009), *and modified in part on other grounds by*, 10 A.3d 1123 (D.C. 2010) (en banc).

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE WERE GENUINE FACTUAL DISPUTES IN THE RECORD.

A. There is no dispute that, at a minimum, the trial court's award must be remanded with instructions that it be reduced by $2,050.

Foote does not dispute that, at a minimum, the trial court's judgment was $2,050 too high. Indeed, Foote concedes that the trial court's award must be reduced by $500 for the damage deposit that was not credited in the award amount. *See* Foote Br. 2 n.1. Moreover, Foote does not dispute that the trial court's award did not credit the $1,450 that Mr. Pajic paid in May 2008 as an advance payment of rent for the last month of the tenancy. *See* Pajic Opening Br. 24 (discussing the trial court's error in not crediting Mr. Pajic's prepayment of the last installment of rent against the judgment).[6] And because this final month of rent was paid in advance, the trial court's judgment must also be reduced by the amount of the late fee assessed for the final month of the tenancy (*i.e.*, $100). Foote challenges none of this and, therefore, at the very least, the trial court's judgment must be remanded with instructions that it be reduced by $2,050.

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[6] Foote acknowledges that Mr. Pajic made this "last month" prepayment in May 2008. *See* Foote Br. 12. It argues, however, that it never allowed Mr. Pajic to apply this prepayment to any earlier month during the tenancy, such as October 2008 or January 2009. *See id.* at 12-13. If that is the case, then this money should have been applied to the last month of rent due before Mr. Pajic moved, *i.e.*, May 2009. The trial court failed to reduce the final award by this amount, *see* Pajic Opening Br. 24, and Foote does not argue otherwise.

B. Foote cannot overcome the genuine factual disputes in the record.

Separate from these accounting issues, the trial court's grant of summary judgment warrants reversal in full because the record in this case reflected genuine disputes of material fact. As explained in Mr. Pajic's opening brief, the record includes contradictory evidence regarding (1) whether Foote accepted cash rental payments for November and December 2008; (2) whether Foote granted Mr. Pajic rent credits; and (3) whether there were housing code violations. *See* Pajic Br. 23-27.

In its opposition brief, Foote repeatedly asserts that there was no genuine dispute on any of these issues because Mr. Pajic did not contest Foote's version of events. This is not an accurate representation of the record. For example, while Foote claims that Mr. Pajic "did not dispute" that "Foote has a strict policy of not accepting cash payments toward rent [and] that no exception was ever made for Pajic," Foote Br. 12, Mr. Pajic repeatedly averred that Mr. Chambers had, in fact, accepted cash payments from him. *See, e.g.*, Answer & Counterclaim ¶ 18 (A33-34); Pajic Deposition 68:10-20 (A257). Similarly, while Foote asserts that Mr. Pajic "did not challenge" its claim that Foote's managers "at no time authorized a rent credit for any reason to Pajic, nor would they have agreed to such a credit in these circumstances," Foote Br. 13-14, Mr. Pajic averred under oath that following the flooding in June 2008, Mr. Chambers offered to reduce the rent due in July. Answer & Counterclaim ¶ 10 (A32); Pajic Deposition 81:1-8 (A261).[7] While Foote is entitled to argue its own version of the facts rather than Pajic's,

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[7] Foote argues that its failure to sue Mr. Pajic for the $200 in rent that he withheld in September 2008 is irrelevant. *See* Foote Br. 13. As explained in Mr. Pajic's opening brief, however, the fact that Foote did not sue for this underpayment supports Mr. Pajic's testimony that he had been offered rent credits to compensate him for the flooding that took place in June and August of 2008. *See* Pajic Br. 25. Moreover, it undermines the credibility of Mr. Chambers'

(footnote continued on next page . . .)

that is not a basis for granting summary judgment. *See Beckman v. Farmer*, 579 A.2d 618, 632 (D.C. 1990) (a party "is not entitled to [summary] judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial." (quotations omitted)).

Similarly inaccurate is Foote's assertion that Mr. Pajic "admitted" he owed at least $6,150 in unpaid rent. *See, e.g.,* Foote Br. 4 ("Pajic admitted that he owed $6,150."); *id.* at 14 ("Pajic *admitted* that he owed approximately $6,150.") (emphasis in original). In his Opposition to Foote's Motion for Summary Judgment, Mr. Pajic noted that Foote was demanding $8,200 for non-payment of rent. Pajic Opposition to Mot. for Sum. J. 9 (A358). He then explained, however, that upon signing the lease agreement in May 2008, he gave Foote checks for a $500 security deposit and $1,450 as a final installment of rent. *Id.* Because Foote's demand for damages did not credit these payments, Mr. Pajic explained that, "when all of Pajic's [May 2008] check payments are accounted for, Foote cannot request more than $6,150[.]" *Id.* at 11 (A360).[8] In other words, Mr. Pajic argued that even if the court were to reject his factual defenses regarding cash payments, rent credits, and housing code violations, the undisputed record of payments showed that he would still only owe $6,150. This was in no way an unqualified acknowledgement of liability, as Foote suggests.

Finally, Foote claims that summary judgment was appropriate because Mr. Pajic's testimony was "shot through with inconsistencies." Foote Br. 4. In actuality, however, Foote

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declaration that Foote "never authorized any rent credit for Pajic, in any amount for any reason for any period." Decl. of Frank Chambers ¶ 22 (A319).

[8] This calculation also appears to take into account that because Mr. Pajic prepaid the final installment of rent, Foote had no basis for asserting a late payment penalty, and the demand should have been reduced by an additional $100. *See* Section II.A, *supra.*

has identified only one inconsistency in Mr. Pajic's testimony: whether Foote had allowed Mr. Pajic to apply his prepayment of the "last installment" of rent in January 2009 (as he averred in his Verified Answer and Counterclaim) or in October 2008 (as he testified at his deposition). This discrepancy, however, does not mean that summary judgment was appropriate. If anything, the inconsistency goes to the question of Mr. Pajic's credibility, and Foote would have been free to explore this issue on cross-examination. It was not a reason for granting summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . .").[9]

III. MR. PAJIC WAS ENTITLED TO PURSUE HIS COUNTERCLAIM.

For the reasons stated in his opening brief, Mr. Pajic's counterclaim was sufficient on its face, and the court erred in dismissing that claim under Rule 12 (b)(6). *See* Pajic Opening Br. 28-34.[10] In his counterclaim, Mr. Pajic articulated a straightforward, factually specific, and sufficient claim for breach of the implied warranty of habitability that was easily more than

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[9] To the extent that Foote contends summary judgment was appropriate because Mr. Pajic did not offer any additional evidence to support the statements in his Verified Answer and Counterclaim or his deposition testimony, that argument is incorrect. As discussed in Mr. Pajic's opening brief, a party is not required to produce documentary or other evidence to support its own sworn statements as to factual matters. Pajic Opening Br. 21-22; *see, e.g.*, *Samm v. Martin*, 940 A.2d 138, 141 (D.C. 2007) (reversing summary judgment and finding that the appellant's deposition testimony served as competent evidence in support of her claims); *Raskauskas v. Temple Realty Co.*, 589 A.2d 17, 26 (D.C. 1991) (reversing grant of summary judgment where a sworn complaint "'disputed all of the material facts relied on by appellees' summary judgment motion," despite the lack of supporting affidavits or any other corroborating evidence).

[10] Foote's assertion that Mr. "Pajic conceded that Foote timely made the repairs," *see* Foote Br. 15, mischaracterizes Mr. Pajic's deposition testimony. In the portion of the deposition where Foote claims Mr. Pajic made this concession, Mr. Pajic simply states that Mr. Chambers and a plumber inspected his apartment the same day he reported the flooding. *See* Pajic Dep. Tr. 98:2-99:18 (A272-73). The testimony says nothing about when the repairs were actually and effectively completed. Nor does it address the timing of the air-conditioning repair.

plausible. *See id.* Foote now argues that, even if this pleading was sufficient, the court could have granted summary judgment on the counterclaim for the same reasons it was warranted on Foote's claim for damages. *See* Foote Br. 15-16. However, for the reasons discussed above, summary judgment was not appropriate on either claim. Therefore, even if the trial court had disposed of the counterclaim under Rule 56 rather than Rule 12 (b)(6), the judgment would have been in error.

CONCLUSION

For the foregoing reasons, and those set forth in Mr. Pajic's opening brief, the judgment of the Superior Court should be reversed, and the case remanded to the Superior Court for a trial on Foote's claim for rent and Mr. Pajic's counterclaim.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief of Appellant to be delivered by first-class mail, postage prepaid, the 21st day of June, 2012, to:

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