No. 15-CV-954

DISTRICT OF COLUMBIA COURT OF APPEALS

DIONNE SMITH,

Appellant

v.

GREENWAY APARTMENTS, LP,
T/A MEADOW GREEN COURTS,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT

OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

BRIEF OF APPELLANT

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

The parties to the case are appellant Dionne Smith, the defendant below, and appellee Greenway Apartments, the plaintiff below. In the Superior Court, Ms. Smith was represented by Amanda Korber and Beth Mellen Harrison, of the Legal Aid Society of the District of Columbia. On appeal, Ms. Smith is represented by Ms. Harrison and Jonathan H. Levy. In the Superior Court, the appellee was represented by William M. Cannon, III. Appellee is also represented in this court by Mr. Cannon. No intervenors or amici appeared in the Superior Court.

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BRIEF OF APPELLANT

STATEMENT OF THE ISSUE PRESENTED

Whether a judgment in an eviction case claiming several months' unpaid rent forever precludes a tenant from bringing a claim against her landlord for substantial housing code violations in her unit during all other prior months not covered by that judgment, based on the tenant's failure to file a permissive counterclaim in that earlier action?

STATEMENT OF THE CASE

Appellant Dionne Smith and her landlord, Appellee Greenway Apartments, entered into two consent judgments in the Landlord and Tenant Branch of D.C. Superior Court, one in February 2013 and one in January 2014. Each prior judgment required Ms. Smith to pay back several months of rent and allowed her to retain possession of her unit. The instant case was filed in the Landlord and Tenant Branch in January 2015, alleging nonpayment of rent for one month. This time Ms. Smith obtained counsel, asserted defenses, and filed a counterclaim seeking recovery of overpaid rent and other credits back three years, the full scope of the applicable statute of limitations period, based on substantial housing code violations in her unit.

Prior to the scheduled bench trial, the trial court (Okun, J.) ruled that the January 10, 2014 judgment between the parties barred any counterclaim for the period prior to the entry of judgment under the doctrine of claim preclusion, and limited Ms. Smith's counterclaim to the period of January 11, 2014 through the trial date. Ms. Smith prevailed at trial on her claim for rent abatement based on substantial housing code violations in her unit during the remaining months for which she was permitted to claim such violations. She then filed this appeal to challenge the trial court's ruling limiting the scope of her counterclaim.

STATEMENT OF FACTS

This appeal concerns ongoing disputes between Appellant Dionne Smith and her landlord, Appellee Greenway Apartments, L.P., about the payment of rent for her apartment at 3501 A Street, S.E., Unit 302, as well as her allegations of substantial, recurrent housing code violations in the unit. During the four years of Ms. Smith's tenancy, the parties have found themselves in the Landlord and Tenant Branch of D.C. Superior Court on allegations of unpaid rent on several prior occasions. In most of these cases, Greenway Apartments filed Complaints for Possession

alleging nonpayment of rent and then dismissed the suits on or before the first court date, presumably because Ms. Smith became current in her rent. Of particular relevance here, two additional cases resulted in consent judgments.

In the first case, filed in December 2012 (Case No. 2012 LTB 33833), Greenway Apartments alleged that Ms. Smith owed two months of rent. Aplt. App. at 80-81. At a continued initial hearing in February 2013, Ms. Smith, unrepresented by counsel, entered into a Judgment for Possession by Consent requiring her to pay back rent and late fees for three months, December 2012 through February 2013. *Id.* at 82-83. This agreement, executed on the court-approved Landlord and Tenant Form 4(a), set out the terms of a consent judgment, with execution stayed on the condition that Ms. Smith comply with the repayment terms. *Id.* Greenway Apartments did not seek to terminate the stay and execute the judgment, indicating that Ms. Smith in fact paid the three months due and owing plus late fees and satisfied the judgment in full.

The second case, filed in November 2013 (Case No. 2013 LTB 31794), again alleged that Ms. Smith owed two months of rent. *Id.* at 73-74. Ms. Smith, still unrepresented by counsel, appeared before the presiding judge at a continued initial hearing on January 10, 2014, alongside counsel for her landlord. *Id.* at 75-79. The two parties explained that Ms. Smith wished to seek emergency rental assistance and required the entry of judgment and the issuance of a writ of restitution in order for her application to be considered. *Id.* at 76-77 (2:10-3:5). The trial court therefore entered a judgment by confession for unpaid rent and late fees for two months, December 2013 and January 2014. *Id.* at 77-78 (3:14-4:10). While the landlord obtained a writ of restitution in order to facilitate Ms. Smith's application for emergency rental assistance funds, the writ was cancelled once Ms. Smith paid her back rent plus late fees in full.

Ms. Smith did not present any defenses or file any counterclaims in the two prior actions. Unrepresented and proceeding on her own, she agreed to the landlord's offer of settlement at an early stage. In both cases, the landlord's Complaints for Possession alleged specific periods of unpaid rent and the cases were resolved by the payment of back rent owed for those specific months.

During the same period of time that the landlord was filing Complaints for Possession against Ms. Smith – between 2012 and 2014 – Ms. Smith faced substantial, recurrent housing code violations in her unit, including water leaks and moisture problems resulting in indoor mold growth, mice and insect infestation, and insufficient heat. When her landlord sued her for unpaid rent again in January 2015, *id.* at 11-12, Ms. Smith retained counsel, asserted defenses regarding the unpaid rent, and filed a counterclaim seeking recovery of overpaid rent and other credits back to March 2012, based on substantial, recurrent housing code violations in her unit during that time period. *Id.* at 13-17.[1]

Prior to the scheduled bench trial, both parties briefed the allowable scope of Ms. Smith's counterclaim. Greenway Apartments sought to bar Ms. Smith from raising any claims for months prior to the date that the most recent judgment between the parties had been entered (January 10, 2014). Ms. Smith sought to recover for the entire three-year period allowed under the applicable statute of limitations, except for the five months covered by the two prior judgments, namely December 2012 through February 2013, December 2013, and January 2014.[2]

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[1] Ms. Smith's counterclaim sought relief back to February 27, 2012, but she concedes – because the counterclaim was not filed until March 13, 2015 – that her counterclaim can only reach back to March 13, 2012. *See* Aplt. App. at 13-17.

[2] On its face, Ms. Smith's counterclaim sought recovery for all months from March 2012 through the date of trial. However, Ms. Smith conceded prior to trial that the five months included in the two prior consent judgments could not be part of her counterclaim under claim preclusion principles. *See id.* at 19-20 (14:13-15:5).

The trial court (Okun, J.) ruled that the doctrine of claim preclusion barred Ms. Smith from raising any counterclaim in the instant case that could have been raised in the prior two cases. *Id.* at 28-33 (7:15-12:2). While noting that neither agreement waived Ms. Smith's claims as a matter of contract law, the court held that claim preclusion principles had the same effect. *Id.* The court opined that this Court had not expressly distinguished between permissive and mandatory counterclaims in their claim preclusion effects, and declined to draw any distinction between the two. *Id.* at 30-31 (9:20-10:22). Ms. Smith's counterclaim therefore was limited to January 11, 2014 through the trial date, covering the period after the most recent judgment between the parties. The result was that Ms. Smith's claim for past rent abatement was reduced by 18 months, from 31 to 13 months.

The case then proceeded to trial, with Ms. Smith presenting evidence of substantial housing code violations with testimony from a government inspector, a private investigator, and Ms. Smith herself. *See id.* at 55-63 (7:5-15:3) (summarizing evidence presented). Through a proffer and limited evidence presented as to prior time periods, Ms. Smith made clear that she was prepared to prove that similar violations had existed prior to January 11, 2014 and as far as back as March 2012 and before. *See id.* at 39-41 (49:9-51:12), 42 (53:10-16), 43-44 (61:24-62:25), 46-47 (70:18-71:9), 48-49 (73:12-74:14), 49-50 (74:15-75:5), 51 (78:5-17), 52-53 (79:25-80:15). At the conclusion of the trial, the court ruled in Ms. Smith's favor on her defenses and counterclaim, finding that it was undisputed that the unit had significant water damage, mold, and rodent and insect infestation; that these housing code violations, and in particular the ongoing presence of mold, had a significant impact on Ms. Smith and her young children; that the landlord had actual or constructive notice of these violations; and that the landlord failed to repair these housing code violations in a timely or adequate manner. *Id.* at 55-63 (7:5-15:3). Based on these substantial,

recurrent housing code violations, the court abated the rent charged by 50 percent for the period of January 11, 2014 through the date of trial. *Id.* at 63-64 (15:4-16:8). Because the abatement due to Ms. Smith exceeded the reduced rent that she would have owed for the months claimed by Greenway Apartments, the court dismissed the Complaint for Possession and entered a money judgment in Ms. Smith's favor in the amount of $3,775.50. *Id.* Ms. Smith then filed this appeal to challenge the trial court's ruling limiting the scope of her counterclaim.

SUMMARY OF THE ARGUMENT

The parties to this appeal agree on a common starting point: a tenant's claim for return of past overpaid rent based on substantial housing code violations is a permissive, not mandatory, counterclaim. That distinction makes all the difference. The law of claim preclusion does not bar a tenant from bringing a claim that, under the applicable court rules, could have been but was not required to be brought as a counterclaim in a previous action. Unlike defenses or compulsory counterclaims, a party's failure to raise a permissive counterclaim in prior litigation does not prevent the party from later litigating that same claim. This permissive counterclaim rule is an exception to the familiar restatement that res judicata bars parties from re-litigating any claims that previously were or could have been raised. While a prior judgment precludes a tenant from later raising housing code violations that could have been raised as a defense to the specific months for which the landlord received judgment, the preclusive reach of the judgment begins and ends there.

ARGUMENT

I. Ms. Smith's Permissive Counterclaim Is Not Precluded by the Prior Judgments Between the Parties.

A. Permissive Counterclaims Fall Under a Recognized Exception to the Preclusive Effect of a Prior Judgment.

Ms. Smith's failure to bring permissive counterclaims in 2013 and 2014 presents no bar to her counterclaim in this case, because the failure to bring a permissive counterclaim has no res judicata, or claim preclusion, effect. Claim preclusion generally bars parties to a cause of action that has reached a final judgment on the merits from re-litigating the same claims in a later proceeding. *See Goldkind v. Snider Bros., Inc.*, 467 A.2d 468, 473 (D.C. 1983). Because an adjudication on the merits "constitutes an absolute bar to a subsequent action," *Cromwell v. Cnty. of Sac*, 94 U.S. 351, 352 (1877), a defendant must raise all defenses to that claim in the first cause of action or forego them permanently. *See, e.g., Laufer v. Westminster Brokers, Ltd.*, 532 A.2d 130, 136 n.16 (D.C. 1987) ("[A] judgment is conclusive not only as to every defense actually presented, but also as to every one which might have been presented.").

The preclusive effect of a final judgment as to any counterclaims, however, depends on the nature of the counterclaim. Counterclaims designated as compulsory are treated like defenses – a judgment is conclusive as to any compulsory counterclaims that were or could have been presented. *See, e.g., Marbury Law Grp., PLLC v. Carl*, 799 F. Supp. 2d 66, 73-74 (D.D.C. 2011). It is the claim preclusive effect of failing to raise such claims that makes them "compulsory"; they *must* be raised or they are lost:

> [C]ompulsory counterclaim. A counterclaim that must be asserted to be cognizable . . . . If a defendant fails to assert a compulsory counterclaim in the original action, that claim may not be brought in a later, separate action (with some exceptions).

Black's Law Dictionary 402 (9th ed. 2009).

Claims that are *not* compulsory, i.e. that *may* be brought in a later, separate action, are denominated as permissive:

> [P]ermissive counterclaim. A counterclaim that need not be asserted to be cognizable . . . . Permissive counterclaims may be brought in a later, separate action.

Id. As the Restatement explains, "Where the defendant *may* interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim . . . ." Restatement (Second) of Judgments § 22(1) (emphasis added). Whether a particular counterclaim is considered compulsory or permissive depends on the rules for the court in which the prior action was brought or any applicable statutory provisions. *See* Restatement (Second) of Judgments § 22(2)(a) (defining compulsory counterclaims as those "required to be interposed by a compulsory counterclaim statute or rule of court").

This permissive counterclaim rule has been recognized by the D.C. Circuit and other federal courts, as well as a variety of state courts. *See, e.g.*, *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 386 U.S. App. D.C. 328, 335, 569 F.3d 485, 492 (2009) (recognizing the general rule that a prior failure to file a counterclaim is not res judicata unless the counterclaim is mandatory or its future prosecution would impair the prior judgment);[3] *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 269 U.S. App. D.C. 53, 56, 843 F.2d 546, 549 (1988) ("Where a defendant neither asserts, nor is required to assert, a counterclaim . . . the previously

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[3] Many of these cases recognize a narrow set of circumstances in which a party's choice not to file a permissive counterclaim in a prior action bars the bringing of that claim in a later action: where "successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action." Restatement (Second) of Judgments § 22(b)(2). Those circumstances clearly do not apply here. In each of the two prior cases, the parties agreed to the entry of a judgment for possession covering specific months: December 2012 through February 2013 in the first case, and December 2013 and January 2014 in the second case. By the landlord's own admission, those rights have been fully satisfied. Ms. Smith does not seek to raise any claims with respect to those five months but instead seeks to raise a wholly distinct issue: the value of her unit for months *not* covered by the prior judgments.

unlitigated issues will not later be estopped by the earlier action."); *Huston v. U.S. Bank N.A.*, 988 F. Supp. 2d 732, 742 (S.D. Tex. 2013) (rejecting claim of res judicata because the counterclaim that could have been asserted in previous action was "permissive, not compulsory"); *Marbury Law Grp.*, 799 F. Supp. 2d at 69 (noting "the general rule that a party failing to assert a permissive counterclaim in a prior action ordinarily will not be barred from bringing a future suit on that claim"); *Hawkins v. Citicorp Credit Servs.*, 665 F. Supp. 2d 518, 525 (D. Md. 2009) ("[W]here a defendant could have brought a counterclaim in the first action but failed to do so, he is not precluded from bringing that claim in a subsequent action unless successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.") (internal quotation omitted); *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1281 (10th Cir. 2006) ("A defendant's failure to assert a *permissive* counterclaim will not preclude that party from instead raising it as a separate claim in a later action.") (emphasis in original); *Egge v. Healthspan Servs. Co.*, 115 F. Supp. 2d 1126, 1130 (D. Minn. 2000) ("[R]es judicata does not bar a claim that is classified as a permissive counterclaim in regards to an earlier action."); *Int'l Ambassador Programs, Inc. v. Archexpo*, 68 F.3d 337, 341 (9th Cir. 1995) (because "there was no rule requiring [the party] to present the claim as a compulsory counterclaim, and, in fact, it did not do so . . . [the party] was, therefore, free to bring suit in a separate forum").[4]

B. The Landlord and Tenant Branch Rules Make All Counterclaims Permissive.

The Landlord and Tenant Branch Rules govern whether a tenant's counterclaim for housing code violations is permissive or compulsory. Instead of incorporating Rule 13 of the

[4] *See also, e.g.*, *Karakas v. Dost*, 240 N.W.2d 743, 748 (Mich. Ct. App. 1976); *G.A.W., III v. D.M.W.*, 596 N.W.2d 284, 288 (Minn. Ct. App. 1999); *Holland v. Mayfield*, 826 So. 2d 664, 670-71 (Miss. 1999); *Crestwood Golf Club, Inc. v. Potter*, 493 S.E.2d 826, 835 (S.C. 1997).

Rules of Civil Procedure governing counterclaims in other civil actions,[5] the Landlord and Tenant Branch adopts its own framework with respect to counterclaims. *See* Super. Ct. L&T R. 2 (omitting Super. Ct. Civ. R. 13, pertaining to counterclaims, from incorporation into the Landlord and Tenant Branch Rules). Rule 5(b) of the Landlord and Tenant Branch Rules provides in relevant part:

> [T]he defendant *may* assert an equitable defense of recoupment or set-off or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. No other counterclaims, whether based on personal injury or otherwise, may be filed in this branch.

Super. Ct. L&T R. 5(b) (emphasis added). Rule 5(b) restricts the filing of counterclaims in two respects: first by limiting their scope, and second by providing that such counterclaims *may* (but not *must*) be raised. All counterclaims in the Landlord and Tenant Branch thus are *permissive*, parallel to permissive counterclaims under Rule 13(b) of the Rules of Civil Procedure. *Compare* Super. Ct. Civ. R. 13(b) ("Permissive Counterclaims. A pleading *may* state as a counterclaim any claim . . . .") (emphasis added), *with* Super. Ct. Civ. R. 13(a) ("Compulsory Counterclaims. A pleading *shall* state as a counterclaim any claim . . . .") (emphasis added).

The choice to make all counterclaims in the Landlord and Tenant Branch permissive and limit their scope is both purposeful and logical. The Landlord and Tenant Branch is limited to summary proceedings for eviction, and its Rules are designed "to secure the just, speedy, and inexpensive determination of every action." Super. Ct. L&T R. 1. Over 34,000 eviction cases were filed in the Landlord and Tenant Branch last year. *District of Columbia Courts' Statistical*

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[5] Rule 13 of the Rules of Civil Procedure follows the federal model, which makes a counterclaim compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Super. Ct. Civ. R 13(a). Most state courts of general jurisdiction follow the same model.

Summary 2014, at 4 (Feb. 2015). In the majority of contested cases, represented landlords obtain consent or confessed judgments from unrepresented tenants, resolving the landlord's allegations of nonpayment of rent with a simple repayment plan. *See id.* at 10; *see also* D.C. Access to Justice Commission, *Justice for All?* 9, 74 (2008) (citing D.C. Superior Court statistics from 2005 indicating that only 3 percent of tenants in eviction cases have counsel, while over 90 percent of landlords are represented).[6] Most such judgments are entered at an early stage in the litigation, often on the first court date. The judgments focus solely on the months sought by the landlord, typically a limited time period, without delving into any defenses or counterclaims the tenant might have raised. It is this simple, summary resolution of a large number of the eviction cases filed that allows the Landlord and Tenant Branch to process tens of thousands of individual cases in a "speedy and inexpensive" manner.

This Court repeatedly has recognized that enforcing Rule 5(b)'s limitation on the scope of allowable counterclaims is critical "to insure an expeditious resolution of landlord-tenant disputes." *Pinzon v. A & G Props.*, 874 A.2d 347, 351-52 (D.C. 2005) (affirming trial court's limiting of counterclaims, noting other claims could be brought in separate proceedings); *see also Killingham v. Wilshire Invs. Corp.*, 739 A.2d 804, 808-09 (D.C. 1999) (barring counterclaims not related to the premises for which possession or unpaid rent is claimed); *Campos v. Aguila*, 464 A.2d 132, 133 (D.C. 1983) (affirming trial court's disallowance of a set-off based on payment to the landlords related to a separate business transaction). Making all allowable counterclaims in the Landlord and Tenant Branch permissive furthers the same goals. If counterclaims were compulsory in the Landlord and Tenant Branch – i.e., if a tenant had to raise a counterclaim to

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[6] Legal Aid estimates that a slightly higher proportion – between 5 to 10 percent of tenants in contested cases in the Landlord and Tenant Branch – now have limited or full representation by counsel.

avoid losing her right to pursue it at a later time – tenants would be encouraged to raise counterclaims whenever possible, incentivizing lengthy litigation over early settlement. Rule 5(b)'s direction that tenants *may* file counterclaims "must be understood in accordance with the simplified procedures of [the Landlord and Tenant B]ranch, which are 'designed to insure an expeditious resolution of landlord-tenant disputes.'" *Killingham*, 739 A.2d at 808 (*quoting Campos*, 464 A.2d at 133). There are sound reasons why the drafters of Rule 5(b) made the filing of any counterclaim in the Landlord and Tenant Branch permissive, not compulsory.

The Vermont Supreme Court reached the same conclusion in an analysis of counterclaims in its small claims court, in a decision that is particularly instructive here. In *Cold Springs Farm Development, Inc. v. Ball*, 661 A.2d 89, 92-93 (Vt. 1995), a buyer of real property sought to dismiss the seller's civil action for breach of contract, arguing that the seller's failure to raise that claim in a prior small claims action for return of a deposit under the parties' contract created a res judicata bar to the subsequent action. Vermont's Superior Court, like the District's, follows a rule of civil procedure, Rule 13(a), making most counterclaims compulsory in a civil action. *See id.* at 93. That rule expressly does not apply in Vermont's small claims court, however, *see id.* (*citing* D.C.C.R. 80.3(a)), as part of an overall scheme to provide "a simple, informal and inexpensive procedure" for resolving small claims disputes. *Id.* at 91. Instead, the only rule regarding counterclaims in the small claims court provides that parties "may" file such claims. *See id.* at 93 (*citing* 12 V.S.A. sec. 5533(c)). The Vermont Supreme Court – noting that "[c]laim preclusion applies to compulsory counterclaims, not permissive ones" – concluded that the judgment in the prior small claims action did not preclude the seller from subsequently filing a civil action seeking additional damages arising out of the same contract. *Id.*

The same logic applies here. Rule 5(b) makes all counterclaims in the Landlord and Tenant Branch permissive as part of an overall scheme to ensure the "speedy, and inexpensive determination of every action." Super. Ct. L&T R. 1. Because claim preclusion does not apply to permissive counterclaims, a tenant's prior failure to raise a counterclaim in the Landlord and Tenant Branch has no preclusive effect in a subsequent action.

C. The Trial Court Erred by Failing to Recognize or Follow the Permissive Counterclaim Rule.

The trial court erred by disregarding the difference between permissive and compulsory counterclaims. The court concluded that claim preclusion bars all defenses, compulsory counterclaims, or permissive counterclaims that "were raised or that might have been raised" in a prior landlord-tenant action, effectively nullifying Rule 5(b)'s conscious choice to make all counterclaims permissive in the Landlord Tenant Branch. *See* Aplt. App. at 30-31 (9:20-10:22). That conclusion was based on three faulty premises. First, the trial court misread *Henderson v. Snider Brothers, Inc.*, 439 A.2d 481, 486 (D.C. 1981) as holding that claim preclusion applies with equal force to defenses and counterclaims, whether permissive or compulsory. *See* Aplt. App. at 21-22 (16:6-17:7). But *Henderson* addresses only a *defense* that could have been raised in a prior action, not a counterclaim, much less a permissive counterclaim. *See* 439 A.2d at 486 ("The fraud alleged in this case is not a counterclaim which could be raised at a time and place of appellants' choice, but is a defense which is lost if not raised in the foreclosure proceeding.").[7] Ms. Smith does not dispute this point; she concedes that her *defenses* to nonpayment of rent for the five months covered by the two prior judgments are barred, and for that reason she withdrew those

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[7] Moreover, *Henderson* applied Maryland law, not District of Columbia law. *See* 439 A.2d at 485.

months from her counterclaim. Her remaining counterclaim, addressed to wholly separate months, is not subject to the same rule.

The trial court also grounded its ruling in a finding that this Court never has distinguished between compulsory and permissive counterclaims. *See* Aplt. App. at 31 (10:6-22). That is simply incorrect. Although the issue has not been presented often, this Court has distinguished between permissive and compulsory counterclaims and their preclusive effect. *See Bobula v. Tamamian*, 55 A.2d 204, 204-05 (D.C. 1947) (where tenant's primary claim is a tort action for injuries allegedly suffered at the property, any counterclaim by the landlord for past due rent was permissive rather than compulsory, and therefore could be raised in a later, separate eviction action).

As further support for treating permissive counterclaims like defenses or compulsory counterclaims, the trial court rested on *Davis v. Bruner*, 441 A.2d 992 (D.C. 1982), a decision vacated by this Court with no binding effect. *See* Aplt. App. at 31 (10:6-22), 34-38 (13:16-17:15).[8] Even if *Davis* were good law, the decision does not address the arguments presented in this appeal about permissive versus compulsory counterclaims. Instead, *Davis* largely focused on a distinct issue: whether a prior judgment between a landlord and tenant prevents the tenant from presenting a claim for relief under the void lease doctrine. *See Davis*, 441 A.2d at 995-96.[9] Even accepting

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[8] *Petition for rehearing granted and decision vacated by* 441 A.2d 992 (D.C. 1982), *trial court affirmed by an evenly divided court by* 470 A.2d 1248 (D.C. 1984). Counsel for Ms. Smith alerted the trial court that the *Davis* decision had been vacated. *See* Aplt. App. at 34-38 (13:16-17:15).

[9] In *Tutt v. Doby*, 265 A.2d 304, 305 (D.C. 1970) and *Gordan v. William J. Davis, Inc.*, 270 A.2d 138, 139-40 (D.C. 1970), this Court held that issue preclusion bars a tenant from asserting a defense or counterclaim under the void lease doctrine following the entry of a prior judgment for possession between the same two parties. *See Davis*, 441 A.2d at 995 (*citing Tutt*, 265 A.2d at 305 and *Gordan*, 270 A.2d at 139-40). That is so because the prior judgment necessarily includes a finding of a valid lease between the parties, while the void lease doctrine requires the opposite showing. *See Gordan*, 270 A.2d at 139-40.

that *Davis* may be right in that regard, it is not relevant to this case – or, indeed, in the vast majority of eviction cases in which tenants assert permissive counterclaims – because Ms. Smith is proceeding on a different theory of recovery. As this Court recognized in *Gordan v. William J. Davis, Inc.*, 270 A.2d 138, 139-40 (D.C. 1970), a tenant asserting housing code violations as a breach of the implied warranty of habitability is not challenging the validity of the lease but instead is seeking to enforce it.

The trial court's essential error in this case was in ignoring the distinction between defenses, compulsory counterclaims, and permissive counterclaims in their treatment under the law of claim preclusion.[10] Recognized authorities – such as the Second Restatement of Judgments, which this Court has relied on extensively – contain broad statements that res judicata applies to claims that "were or could have been raised." *See, e.g.*, *Rhema Christian Ctr. v. District of Columbia Bd. of Zoning Adjustment*, 515 A.2d 189, 193 (D.C. 1986) (*citing* Restatement (Second) of Judgments § 17 for the proposition that res judicata includes issues that were or "might have been" raised previously). But those same authorities recognize that the broad principle yields to the more specific rule that the failure to bring a *permissive* counterclaim has no res judicata effect. *See* Restatement (Second) of Judgments § 22; *see also Moore's Federal Practice* Chapter 131.21

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[10] The decision below does not reflect a majority view among Superior Court judges. *Compare Novo Development Corporation v. Thomas*, Case No. 2012 LTB 017628, at *4 n.1 (D.C. Super. Ct., Apr. 30, 2013) (holding that any *defenses* to months covered by a prior judgment were barred but that any *counterclaim* for months before the judgment could proceed, citing "the general rule . . . that failure to assert a permissive counterclaim does not preclude the party from asserting that claim in a later case"), *with Rudden Real Estate v. Spencer*, Case No. 2012 LTB 29259 (D.C. Super. Ct., July 30, 2012) (holding that both defenses and counterclaims that could have been raised in a prior eviction case were barred, without addressing the recognized exception for permissive counterclaims), *and Oakes Management, Inc. v. Smith*, Case No. 2012 LTB 23911 (D.C. Super. Ct., Mar. 27, 2013) (holding that tenant's counterclaim was not barred as a matter of contract law, because the plain language of the parties' prior consent judgment did not resolve or even address any counterclaims the tenant might have raised).

(3d ed.) (reciting the broad general statement that "Claim Preclusion Doctrine Bars Claims Which Were or Should Have Been Brought in Prior Action," but then making clear that "[g]enerally, if a matter is not required to be litigated as a compulsory counterclaim, the defendant is free to assert it in a subsequent action"). Because the framers of the Landlord and Tenant Branch Rules made all counterclaims permissive, the claim preclusion effects of failing to file a counterclaim in the Landlord and Tenant Branch are governed by the more specific permissive counterclaim rule. That is so regardless of whether those counterclaims might be considered compulsory under background claim preclusion principles or other court rules that do not specifically apply to actions in the Landlord and Tenant Branch.

Ms. Smith's counterclaim, like all counterclaims filed in the Landlord and Tenant Branch, is permissive by definition under Rule 5(b). Her counterclaim therefore falls within the recognized exception to general claim preclusion principles for permissive counterclaims. The apparent tension between the general rule and the results in this case simply reflects the fact that permissive counterclaims are an exception to the broader, general rule, a point recognized by other courts in considering this same issue and concluding properly that permissive counterclaims have no preclusive effect. *See, e.g.*, *Marbury Law Grp.*, 799 F. Supp. 2d at 73 (rejecting assertion that counterclaims that "could have and should have been raised" in a previous action were "barred by the doctrine of *res judicata*," in favor of "the general rule that a party failing to assert a permissive counterclaim in a prior action ordinarily will not be barred from bringing a future suit on that claim"); *see also New Port Largo, Inc. v. Monroe Cnty.*, 706 F. Supp. 1507, 1513 (S.D. Fla. 1988) (noting the general claim preclusion rule and the permissive counterclaim exception); *In re Tariff Filing of Cent. Vt. Pub. Serv. Corp.*, 769 A.2d 668, 673 (Vt. 2001) (same); *Crestwood Gold Club*, 493 S.E.2d at 835 (same); *Joseph v. Darrar*, 472 P.2d 328, 331 (Idaho 1970) (same).

The trial court erred by lumping defenses, compulsory counterclaims, and permissive counterclaims together under a broad ruling that any claim that "might have been raised" before is forever barred. The law of claim preclusion does not sweep so broadly. Ms. Smith's potential claims for housing code violations for all months not covered by the parties' prior judgments were permissive counterclaims, and under the black letter law of claim preclusion her failure to bring those claims in prior actions has no res judicata effect.

II. Treating Prior Judgments As Preclusive of Tenants' Permissive Counterclaims Would Have Unfair and Impractical Consequences.

The landlord's position in this appeal is that consent judgments, which on their face only address repayment of back rent for specific months, must be interpreted broadly as extinguishing a tenant's claims for housing code violations in months that were not at issue in the case and were never addressed by the parties or the court. This result would be both unfair and impractical for the thousands of unrepresented tenants who enter these agreements every year in the Landlord and Tenant Branch. Only a very small percentage of tenants in eviction cases have counsel, while over 90 percent of landlords have representation. *Justice for All?*, *supra*, at 9. Counsel for the landlord usually reaches a consent judgment with an unrepresented tenant following very brief, informal negotiations focused on the specific months at issue in the landlord's case. Most consent judgments are presented as take-it-or-leave-it offers, on pre-printed Landlord and Tenant Form 4(a), with set terms not subject to negotiation. The vast majority of those agreements require the tenant to pay back all rent claimed by the landlord but provide some amount of time – perhaps a few weeks or a few months – for the tenant to become current. For a tenant like Ms. Smith, who may be able to raise defenses to the landlord's claims but is unaware of her right to do so or simply chooses not to, the consent judgment offers time in exchange for waiving those defenses as to the specific months claimed.

If Rule 5(b) did not exist – and Greenway Apartments' arguments in this case were right – the balance of that bargain would be quite different. In the absence of the Rule, when Ms. Smith entered her consent judgment in February 2013, and when she confessed judgment before the Superior Court in January 2014, she would not only have waived her *defenses* to the landlord's claims as to two or three specific months but also would have forever given up a counterclaim stretching back years and potentially valued at thousands of dollars.[11] And she would have been waiving those claims despite the fact that the agreement was silent as to any such claims (and the time period covered by those claims), and no attorney, judge, or court officer ever advised her of these consequences.[12] By making all counterclaims permissive, Rule 5(b) prevents exactly this result.

Interpreting consent judgments such as those entered by Ms. Smith as waiving all counterclaims for prior periods of time would have one of two results for Ms. Smith and thousands of tenants like her. Faced with an imminent threat of eviction and homelessness, tenants might waive claims worth hundreds or thousands of dollars in exchange for a promise that any eviction will be delayed, even for a short period of time. Patently unfair agreements would be entered at the expense of unrepresented tenants. Alternatively, armed with the knowledge that entering a consent judgment could result in the loss of valuable claims, many more tenants might opt for trial.

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[11] The trial court in this case awarded Ms. Smith a 50 percent rent abatement for those months covered by her counterclaim, as limited by the trial court's ruling. *See* Aplt. App. at 63-64 (15:4-16:8). If Ms. Smith had received a similar abatement for the 18 months excluded by the trial court's ruling, the money judgment entered in her favor would have been for $8,575 more.

[12] If Ms. Smith had struck such a deal, there would have been serious questions about whether the prior consent judgments would have been unconscionable and thus unenforceable. *See Urban Invs., Inc. v. Branham*, 464 A.2d 93, 100 (D.C. 1983) (defining unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party") (*quoting Williams v. Walker-Thomas Furniture Co.*, 121 U.S. App. D.C. 315, 319, 350 F.2d 445, 449 (1965) (footnote omitted)); Restatement (Second) of Contracts § 208(d).

That outcome is not remotely consistent with the goal of the Landlord and Tenant Branch to ensure "the just, speedy, and inexpensive determination of every action." Super. Ct. L&T R. 1.

Neither result would be in keeping with the Rules of the Landlord and Tenant Branch or the law of claim preclusion. Instead, this Court should hold that all counterclaims filed by tenants in eviction actions in the Landlord and Tenant Branch are permissive counterclaims, which can be raised or preserved for a later, separate action at the tenant's option, without any claim preclusive effect in future actions.

CONCLUSION

For the foregoing reasons, the ruling of the Superior Court limiting Appellant Dionne Smith's counterclaim under principles of claim preclusion should be reversed, and this case should be remanded for a trial on the remaining months of Ms. Smith'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 Brief of Appellant Dionne Smith to be delivered by first-class mail, postage prepaid, this 16th day of November, 2015, to:

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