

**DISTRICT OF COLUMBIA COURT OF APPEALS**

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

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MARIA T. WILSON,

Appellant,

v.

MODERN MANAGEMENT CO.,

Appellee.

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

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**REPLY BRIEF OF APPELLANT**

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## SUMMARY OF ARGUMENT

Our opening brief shows that the trial court's order entering judgment for possession in favor of Modern Management was based on factual and legal errors relating to Maria Wilson's defenses of fraud and unconscionability. Those defenses, which were presented in Ms. Wilson's verified answer and papers in opposition to Modern Management's summary judgment motion, negated the validity of the purported lease agreement on which Modern Management's case for eviction depended and precluded the entry of summary judgment in its favor. In its opposition brief, Modern Management does not dispute that Ms. Wilson advanced the defenses of fraud and unconscionability, that they rested on disputed issues of material fact, or that the trial court was wrong in supposing that they were earlier stricken by a different trial judge when he struck Ms. Wilson's distinct plea of title defense. Rather, Modern Management's brief is devoted mainly to defending the trial court's original entry of the protective order and its order striking the plea of title defense, which are not the subject of this appeal. (Appellee Br. at 10-21.)<sup>1</sup>

As for the portion of Modern Management's brief addressing the order at issue on appeal, two arguments are made in support of summarily entering judgment for possession: (i) even though fraud and unconscionability are valid defenses that negate the purported lease, the trial judge could disregard them under Rule 5(b) of the Landlord and Tenant Rules, which limits the assertion of counterclaims seeking affirmative relief against a landlord in an eviction action; and (ii) whatever the merits of Ms. Wilson's challenges to the validity of the purported lease agreement or the reasons for her falling behind in protective order payments, a history of making late protective order payments alone justified the entry of judgment for Modern Management. (Appellee Br. at 22-27.) Neither argument has merit.

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<sup>1</sup> We do not concede that either of the orders was proper, however the validity of the judgment does not depend on either of them.

Modern Management's first argument is without merit because Rule 5(b) only limits the kinds of counterclaims that a tenant may assert against her landlord in a possessory action. The rule does not affect a tenant's ability to assert legal defenses to the landlord's action, which is what Ms. Wilson did when she contested her eviction for non-payment of rent on the grounds that the lease is unenforceable and Modern Management is not her landlord. As a matter of law, therefore, the trial court erred in not reaching the merits of those defenses when ruling on Modern Management's motion for summary judgment. *See, e.g., Barton v. District of Columbia*, 817 A.2d 834, 840-41 (D.C. 2003) (reversing eviction of commercial lessee because the trial court failed to consider racial discrimination defense and erred in deeming it an impermissible counterclaim).

Also without merit is Modern Management's second argument that the trial court was entitled to strike Ms. Wilson's defenses and enter judgment as a sanction for her failure to make two timely protective order payments. That is so for a number of reasons.

*First*, the only motion properly before the trial court on August 25, 2004 when it entered judgment for possession against Ms. Wilson was Modern Management's motion for summary judgment. Its motion to strike for failure to make protective order payments, filed on August 23, was noticed for a hearing on August 31 and, in any event, could not have been considered until August 30 at the earliest (assuming Ms. Wilson was served with it on the day of filing). SCR-LT 13(c). As this Court has held, an order prematurely granting a motion to strike pleadings and entering judgment for possession must be reversed. *Battle v. Nash*, 470 A.2d 1252, 1255 (D.C. 1983).

*Second*, assuming for purposes of argument that the trial court could have considered Modern Management's motion to strike pleadings on August 25, it is error to summarily enter an

eviction judgment for failure to make protective order payments without first conducting an inquiry into the reasons timely payments were not made. *Haynes v. Logan*, 600 A.2d 1074, 1076 (D.C. 1991); *Jamison v. S & H Assocs.*, 487 A.2d 619, 621 (D.C. 1985). In other words, eviction cannot be automatic, even if the defendant has not complied with the protective order. The trial court made no inquiry in this case.

*Third*, the trial court's order cannot be sustained as a proper exercise of discretion due to the manifest "absence of the traditional landlord-tenant relationship." *Walker v. Smith*, 499 A.2d 446, 450 (D.C. 1985). As described more fully below, even where the defendant has fallen behind on protective order payments and the plaintiff has moved to strike pleadings and enter judgment, the validity of the lease and the existence of a landlord-tenant relationship are necessary preconditions to granting possession. *See Jamison*, 487 A.2d at 621 (notice is a precondition for judgment of possession). Here, there could be no doubt from the record that, whatever the relationship was between Modern Management and Ms. Wilson, it was not a traditional landlord-tenant relationship. From the outset of the proceedings, Ms. Wilson contested the validity of the lease and denied that Modern Management was ever her landlord. She also filed a verified answer and affidavit in opposition to summary judgment describing the fraudulent representations inducing her to sign documents regarding the Taylor Street property. Furthermore, the lease and other documents presented by Modern Management did not on their face establish an ordinary landlord-tenant relationship, but instead underscored the unusual circumstances that (i) the house had long been titled to Ms. Wilson; (ii) Ms. Wilson was still obligated to pay the mortgage on the house; and (iii) Ms. Wilson had the right to sell the property so long as she gave Vincent Abell (the sole owner of Modern Management) a share of the proceeds. (J.A. at 58-74.) Those circumstances were consistent with the sham transaction

averred in Ms. Wilson's pleadings. On the record before it, the trial court not strike Ms. Wilson's pleadings on the assumption that the lease was valid. Nor could the trial court find, on this record, that allowing the case to proceed to trial without the protective order payments would present any risk of "confiscating" Modern Management's property.

*Fourth*, Modern Management is wrong to argue that, where missed protective order payments in possessory actions are involved, judgment can summarily be entered for the landlord even if an injustice would result, presumably to vindicate the court's authority. (Appellee Br. at 18.) The Court has long rejected the notion of entering judgment as punishment for violating a protective order. See *Mahdi v. Poretsky Mgmt., Inc.*, 433 A.2d 1085, 1086-88 (D.C. 1981) (adopting an opinion by then-Superior Court Judge Schwelb). More generally, this Court has repeatedly stated a strong preference for adjudication on the merits, not as a sanction for a party's violation of court rules or orders. A protective order is no different from any court order in this regard. *Id.* at 1087-88 (referring to discovery sanction under Rule 37). There is no justification for the uniquely punitive treatment of protective orders advocated in Modern Management's brief. (Appellee Br. at 12-13.)

## ARGUMENT

### A. Landlord and Tenant Rule 5(b) Did Not Preclude the Legal Defenses of Fraud and Unconscionability

There is no question from the record of the proceedings below that Ms. Wilson challenged the enforceability of the purported lease as well as the existence of a landlord-tenant relationship between her and Modern Management. Ms. Wilson's January 2004 answer contends that she is the "sole owner of premises." (J.A. at 28 (emphasis in original)). In February 2004, during an initial hearing before Judge Hedge, Ms. Wilson's attorney explained that Modern Management's representatives obtained the purported lease on the house that Ms.

Wilson owned for more than 20 years by falsely promising to pay off the balance of her mortgage so that she would be saved from imminent foreclosure and have more time to find refinancing. (*Id.* at 35.) In her August 2004 amended verified answer, Ms. Wilson denied being a tenant of Modern Management (*id.* at 129), and contended that the purported lease was obtained by fraud (*id.* at 134-35) and that the transactions between her and Modern Management were unconscionable (*id.* at 135-36). In her written opposition to Modern Management's summary judgment motion, Ms. Wilson contended, among other things, that she "never consented to a lease" (J.A. at 119) and that Modern Management is "not a lawful landlord." (*Id.* at 120.) She also attached an affidavit substantiating her contentions. (*Id.* at 121.) The contention that a lease is invalid is a defense to eviction based on non-payment of rent specified in the lease.<sup>2</sup>

While it is true that Ms. Wilson's defenses of fraud and unconscionability are styled as "counterclaims" in her amended answer, it is clear from the context of her allegations as well as her representations to the court that she was not seeking money damages for these "claims," but rather, was asserting them as defenses to Modern Management's action for possession. Specifically, Ms. Wilson contended that she did not have to pay rent to Modern Management or give it possession of her home because the purported lease was fraudulently obtained and was unconscionable. Ms. Wilson's verified answer and summary judgment affidavit set forth the

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<sup>2</sup> Furthermore, this Court has endorsed the right of purported tenants to advance as legal defenses to possessory actions the precise legal defenses Ms. Wilson raised below, that is, the defenses that the lease was illegal and unenforceable. *See e.g., Shin v. Portals Confederation Corp.*, 728 A.2d 615, 618-19 (D.C. 1999) (defendant's allegations challenging validity and enforceability of lease itself could be raised as legal defenses to landlord's claim for back rent); *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 481, 139 U.S. App. D.C. 101, 108 (D.C. 1970) (in action for possession, "tenant may interpose the defense that no rent was owed either because the landlord breached his contractual obligations to the tenant, or because the lease was illegal and void ab initio").



factual basis of fraud and unconscionability defenses. That was enough to place the defenses before the court, particularly given the allowances that must be made for *pro se* pleadings and the fact that no answer is required to assert a defense in a landlord tenant case.

The record is similarly clear that, not only did Ms. Wilson present the defenses, the trial court understood her to have done so. At the hearing in April 2004 when Judge Campbell struck Ms. Wilson's plea of title defense as a sanction for untimely protective order payments, he expressly instructed that his ruling would not affect a remaining "aspect of her defense," that is, Ms. Wilson's contention that "there is no lease . . . namely that this was all concocted and there really isn't a lease, and therefore she doesn't owe rental payments." (J.A. at 79.) With these words, Judge Campbell succinctly captured the essence of Ms. Wilson's invalid-lease defenses.

Because Ms. Wilson asserted legal defenses to the possessory action, Rule 5(b) does not bar them. (Appellee Br. at 23.)<sup>3</sup> See, e.g., *Barton v. District of Columbia*, 817 A.2d 834, 841 (D.C. 2003) (where tenant presented racial discrimination as defense to eviction proceeding, it was not barred by Landlord and Tenant Rule and trial court erred in failing to consider its merits); *Shin*, 728 A.2d at 618-19 ("Notwithstanding Rule 5(b), a defendant always has a right to present any legal defense as part of a general denial of liability") (emphasis in original).

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<sup>3</sup> Rule 5(b) provides:

In actions in this Branch for recovery of possession of property in which the basis of recovery is nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the 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. This exclusion shall be without prejudice to the prosecution of such claims in other Branches of the Court.

**B. Modern Management's Motion to Strike Pleadings Was Not Ripe for Decision**

When Judge Hedge summarily granted judgment for possession against Ms. Wilson at the August 25, 2004 hearing, only Modern Management's July 21, 2004 motion for summary judgment was ripe for decision. (J.A. at 92-105, 148-49.) On appeal, Modern Management contends that its August 23, 2004 Motion to Strike for Failure to Make Protective Order Payments (*id.* at 141) was also before the court and posits that Judge Hedge ultimately granted that motion, not the summary judgment motion, when she entered judgment for possession. (Appellee Br. at 7, 22.) Modern Management adopts this view without citing any statement in the record by Judge Hedge that she was granting the motion to strike.<sup>4</sup> In any event, as a matter of law, the trial court could not have ruled on Modern Management's motion to strike during the August 25 hearing because less than five days had passed since Modern Management filed it.

Rule 13(c) of the Landlord and Tenant Rules provides that motions filed "shall be heard not earlier than the 5<sup>th</sup> day after service of the motion, whether served by hand or by mail." As this Court has observed, Rule 13's requirements of a written motion and five-day period after service "protect the opposing party from surprise and enable the court to give more than the usual, necessarily cursory, attention to an issue which demands it." *Battle v. Nash*, 470 A.2d 1252, 1254 (D.C. 1983). On the day of the hearing, barely two days had elapsed since Modern Management filed its motion to strike (the record does not show whether or when Ms. Wilson was served with it) and Ms. Wilson had no forewarning that the court would consider the motion. Indeed, Modern Management's motion requested that a hearing be set on the matter a week later — on August 31, 2004. (J.A. at 141.) Thus, the trial court could not have ruled on the motion to strike on August 25 and, if it did (as Modern Management contends), the judgment must be

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<sup>4</sup> Judge Hedge's references to Judge Campbell's earlier striking of Ms. Wilson's plea of title defense and the subsequent failure to make timely protective order payments were consistent with the arguments in Modern Management's summary judgment papers. (J.A. at 92, 97, 152.)

reversed for the court's premature consideration of the motion. *Battle*, 470 A.2d at 1255 (trial court erred in granting motion to strike pleadings and entering judgment against tenant where five days had not passed, as Rule 13 requires, since landlord made motion).

**C. Even if the Trial Court Could Have Properly Considered Modern Management's Motion to Strike at the August 25 Hearing, Granting it Would Be Error**

Assuming for purposes of argument that — the five-day pause mandated by Rule 13(c) notwithstanding — Judge Hedge was ruling on the motion to strike pleadings when she granted judgment for possession, the decision still would be in error because the court did not reach the merits of Ms. Wilson's defenses. On appeal, Modern Management contends that, applying the standard introduced in *Davis v. Rental Assocs., Inc.*, 456 A.2d 820 (D.C. 1983) (*en banc*), the trial court did not have to consider the defenses and properly struck them and entered judgment as a sanction for falling behind in protective order payments. (Appellee Br. at 22-27). Modern Management misinterprets this Court's precedent. In fact, in this case, the factors courts must consider under *Davis* squarely implicate the merits of Ms. Wilson's defenses.

In *Davis*, the Court held that, where a "tenant fails to abide by the protective order," the trial court may "impose sanctions," including the striking of the tenant's pleadings and entry of judgment for the landlord. *Davis*, 456 A.2d at 826, 827. However, the Court also held that "the trial court must carefully examine several specific factors" before imposing such sanctions, namely: (i) the extent of the tenant's non-compliance with the protective order; (ii) the reasons for that non-compliance; and (iii) the landlord's right to be free from governmental takings without just compensation. *Id.* at 826-27 (emphasis added); *Haynes v. Logan*, 600 A.2d 1074, 1076 (D.C. 1991). *Davis* did not hold that these factors are the only factors relevant to deciding whether to impose sanctions. And the Court stressed that a trial court is exercising its "equity power" when faced with such motions. *Davis*, 456 A.2d at 827.

As an initial matter, Judge Hedge never explicitly considered any of the three *Davis* factors on August 25 or asked for any relevant testimony. Nor would it be reasonable to expect Ms. Wilson to offer such testimony that day as she had no reason to think that the trial court was considering a motion which had been noticed for a hearing the following week. *See supra* at 7-8. The failure to conduct the required inquiry is reason alone for reversing and remanding the trial court's order. *Haynes*, 600 A.2d at 1076 (trial court erred in entering judgment for possession "without hearing any testimony" regarding tenant's non-compliance with the protective order, nor could "accumulation of hearings on matters before different trial judges . . . substitute for the hearing mandated by *Davis* and subsequent cases").

Moreover, if the trial court had conducted an inquiry, it would have been error to reach a decision on the motion to strike without examining the merits of Ms. Wilson's legal defenses. That is because Ms. Wilson's defenses place at issue the third *Davis* factor — the landlord's right to be free from governmental takings without just compensation. *Davis*, 456 A.2d at 827. Specifically, if there is no enforceable lease or genuine landlord-tenant relationship, there could be no danger that Modern Management's property was being unjustly "confiscated" by the court's adjudicating the defenses of a tenant who fails to pay rent and Ms. Wilson's own substantial property interest would weigh heavily against granting possession of the house to Modern Management.<sup>5</sup>

A landlord tenant relationship based on a valid contractual obligation to pay rent is implicit in the *Davis* court's rationale for the third factor. *See also Walker v. Smith*, 499 A.2d 446, 450 (D.C. 1985) (validity of a protective order "open to serious question" in the "absence of

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<sup>5</sup> Indeed, it is doubtful, absent the lease, that Modern Management would even be a proper party to seek possession, because the "deed" purporting to transfer Ms. Wilson's title is made to Vincent Abell individually, not to Modern Management. (J.A. at 65.)

the traditional landlord-tenant relationship, with the privity of contract"). The Court quoted the following language from *Mahdi v. Poretsky Mgmt., Inc.*, 433 A.2d 1085, 1089 (D.C. 1981):

If this litigation is permitted to continue with no funds in the registry and with Tenant on the premises, Landlord will not be in a position to rent the unit to a paying tenant. He will continue to be deprived of funds which he may well need to pay his mortgage, to maintain other tenants' apartments, and for other appropriate purposes.

*Davis*, 456 A.2d at 827 n.7. Thus, a court may be more justified in granting possession to the landlord when the landlord needs the rent to maintain the property and, without it, is in danger of losing the property before the action is resolved, and when the tenant would simply be obligated to pay the court an amount the tenant has previously agreed to pay the landlord directly (or less). In this case, in contrast to the ordinary case, Ms. Wilson's defenses disputed the precondition of a valid lease and landlord-tenant relationship, and the trial court erred in failing to examine them before entering judgment for possession.

Nor is this case (as Modern Management contends) like *King v. Jones*, 647 A.2d 64, 65 (D.C. 1994), where the landlord made a *prima facie* showing to counter the tenant's defenses. (Appellee Br. at 24-26.) Far from making a *prima facie* showing of an enforceable lease and landlord-tenant relationship, the documents tendered by Modern Management to the court and the uncontested evidence presented by Ms. Wilson raise serious questions about the notion that Modern Management's property rights were in jeopardy if Ms. Wilson did not pay rent. In particular, the record included: (i) an affidavit from Ms. Wilson describing Modern Management's false representations which induced her to sign documents concerning her house (J.A. at 121); (ii) evidence that the terms of Ms. Wilson's supposed sale of the house to Modern Management's agent Mr. Abell meant a windfall to Modern Management (*id.* at 59-61); and (iii) uncontested representations that, Modern Management's promises notwithstanding, Ms. Wilson

was obligated to pay the mortgage on the Taylor Street property (*id.* at 35, 44, 119-20). *See Jamison v. S & H Assocs.*, 487 A.2d 619, 621 (D.C. 1985), (on motion to strike pleadings and enter judgment, trial court “plainly erred” by failing to make “any inquiry into the tenant’s allegation that the landlord had misrepresented a fact critical to its suit for possession — namely, that the tenant had waived in writing his right to a thirty-day notice to quit”).

**D. Summary Judgment Should Not Have Been Granted Because Ms. Wilson Still Had Valid Legal Defenses which the Court Failed to Address**

In the more likely event that the trial court was considering Modern Management’s motion for summary judgment rather than its motion to strike on August 25, the court also should not have granted the motion because Ms. Wilson had legally valid defenses the facts of which were genuinely disputed. *See, e.g., Childs v. Purll*, 882 A.2d 227, 232-33 (D.C. 2005) (appeals court applies same standard as trial court in considering summary judgment motion and “therefore must determine whether the party awarded summary judgment demonstrated that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law”) (citations omitted). The trial court’s conclusion that it could grant Modern Management’s motion without reaching the merits of Ms. Wilson’s defenses rested on the following legal and factual errors.

*First*, the trial court’s suggestion (apparently adopting Modern Management’s argument in its summary judgment papers) that Judge Campbell’s striking of the plea of title defense wiped out Ms. Wilson’s remaining defenses. (J.A. at 152.) As we explain in our opening brief, striking the plea of title defense did not affect Ms. Wilson’s defenses of fraud and unconscionability, which do not depend on who holds title to Ms. Wilson’s house, but rather, who has a right to possess it. (Appellant Br. at 19-21.) *See also Patrick v. Hardisty*, 483 A.2d 692, 697 (D.C. 1984) (trial court erred in granting summary judgment motion in action for

possession by focusing exclusively on tenant's plea of title defense and ignoring record "rais[ing] factual questions about the respective rights of the parties regardless of who holds title").

*Second*, the trial court's statement that Ms. Wilson's defenses are "not ones that can be placed against a suit for possession even on the merits." (J.A. at 152.) As we explain above, challenges to the enforceability of a lease or the existence of a landlord-tenant relationship are valid defenses to possessory actions. *Supra* at 5.

*Third*, the trial court's observation during the hearing that the entry of judgment for possession would not foreclose Ms. Wilson from advancing a fraud claim in a separate action in the Civil Actions Branch. (J.A. at 152.) This does not address the inequity of Ms. Wilson being evicted in the meantime by people with no right to possess her home.

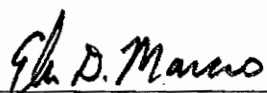
Because Ms. Wilson's defenses to the possessory action were legally valid, the trial court erred in not considering their merits before ruling on Modern Management's motion. *Momenian v. Lustine Realty Co, Inc.*, 693 A.2d 1125, 1126-27 (D.C. 1997) (trial court erred in summarily entering judgment for possession without considering merits of tenant's defenses). Because there were material facts in dispute, the trial court could not have granted summary judgment for Modern Management. This Court must therefore reverse and remand the trial court's order. *See Patrick v. Hardisty*, 483 A.2d at 696 ("Where there is the slightest doubt as to the fact, summary judgment is not in order") (reversing summary judgment in case involving complaint for possession of property).

## CONCLUSION

For these reasons and the reasons set forth in our opening brief, the judgment awarding Modern Management possession should be reversed, and the case remanded with instructions to decide the merits of Ms. Wilson's defenses.

January 30, 2006

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of Appellant was served by first class mail, postage prepaid, to Michael E. Brand, Loewinger & Brand, PLLC, 471 H Street, N.W., Washington, D.C. 20001, this 30th day of January, 2006.

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