DISTRICT OF COLUMBIA COURT OF APPEALS

No. 05-CV-879

MICHELLE KING,
LUONG LE,

Appellants,

v.

FIDELIA BERINDOAGUE,
CLELIA BERINDOAGUE,
STACIE COURBOIS,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, Landlord & Tenant Branch
No. LT 18408-05

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

The appellees Fidelia Berindoague, Clelia Berinoague and Stacie Courbois (collectively, "Landlords") make two principal arguments in support of their claim that appellants Michelle King and Luong Le ("Tenants") were not entitled to a jury trial in the court below: (1) that the Tenants forfeited their right to a jury trial by not making a timely demand; and (2) that the Tenants did not properly assert their retaliation defense. Both of these arguments are flawed, as we demonstrate below.[1]

I. The Tenants Were Entitled to a Jury Trial.

A. *The Landlords Do Not Dispute That the Tenants Raised Issues of Material Fact Necessitating a Trial.*

The Landlords acknowledge that the trial court's *ad hoc* proceeding cannot be defended as a kind of summary judgment hearing because the Tenants raised disputed issues of fact about the Landlords' intent. The Landlords also do not dispute that those issues were material to both the validity of Stacie Courbois's claim that she intended to occupy the apartment for her personal use and the Tenants' affirmative defense of retaliation. Rather, the Landlords maintain that the hearing "was handled by the Trial Court as a trial matter." (Landlords' Br. 6; emphasis in the original.)

The Landlords' concession aside, the two key issues in the court below were whether Ms. Courbois "[sought] *in good faith* to recover possession of the rental unit" for her personal use, D.C. Code § 42-3505.01(d) (emphasis added), and, alternatively, whether the Landlords sought possession to retaliate against the Tenants for their protected activity, D.C. Code § 42-3505.02.

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[1] The issue of whether the Tenants were entitled to a jury trial on the Landlords' intent regarding occupation of the apartment and on retaliation is an issue of law to which the standard of review is *de novo*. *Anderson v. Abidoye*, 824 A.2d 42, 44 (D.C. 2003).

Questions of motive and intent generally, and on the record in this case, must be decided by the trier-of-fact at trial.

As the Court emphasized in *Dewey v. Clark*, 180 F.2d 766 (D.C. Cir. 1949), a case where the tenant sought a jury trial on whether the landlord had a good faith desire to possess the property for her own use, "'[t]he issue of good or bad faith is ordinarily a question of fact for the jury.'" *Id.* at 773 (quoting *Hatfield v. Barnes*, 115 Colo. 30 (1946)). Here, the Tenants offered "'substantial evidence challenging the good faith of the landlord, [creating] a question of fact . . . for determination by the jury or trial court.'" *Id.* (quoting *Olessoff v. Osbourn*, 47 A.2d 514, 515 (D.C. 1946)). In the court below, the Tenants squarely challenged the Landlords' intent and good faith (App. 14, 16-17, 48-49), and they elicited testimony that was inconsistent with Ms. Courbois's claim that she actually intended to occupy the apartment herself. (For example, on cross examination Ms. Courbois testified that she had never seen the apartment she supposedly intended to occupy, and she admitted that other units in the building had recently become vacant but she had not chosen to occupy them. *See* Appellants' Br. 10-11.)

B. *The Tenants Did Not Waive Their Jury Trial Right.*

The Landlords argue that it was proper for Judge Weisberg, rather than a jury, to resolve the credibility questions in this case because the Tenants "failed to file a verified jury demand as required by Landlord Tenant Rule 6." Appellee Br. 2; *see also* Appellee Br. 1 ("Defendant . . . appeared . . . without . . . a pleading asserting a jury demand"); 6-7 ("At no time did Tenant proffer a copy of her . . . purported jury demand"); 8 ("at no time does the record confirm that Tenant proffered to the Court any lodged or proposed pleading or jury demand"); 11 ("Tenant . . . did not even tender to the Court a . . . pleading . . . which would suffice for purposes of LT Rule 6."); 12 ("At no time did Tenant proffer a written pleading containing a . . .

jury demand."). This argument was not raised below and is flatly inconsistent with the law and the record in this case.

The short answer to this argument is that the record shows that the Tenants came to court with and served a verified answer and jury demand satisfying L&T Rule 6.[2] The only reason the verified answer was not actually *filed* in the Court file was that the Clerk's office refused to file it because of a computer malfunction. This Court has held on several occasions, however, that litigants are not to be deprived of their right to pursue their case because of an error by the Clerk's office. *Schmittinger v. Schmittinger,* 538 A.2d 1158 (D.C. 1988) (where neither party received notice from the clerk through the mails of the judgment, court is authorized to extend time for appeal); *Fisher v. Small,* 166 A.2d 744 (D.C. 1960) (failure to note date of filing on motion for a new trial, return of motion to counsel, and file stamping a later date was a clerical error which was capable of being remedied "under the court's inherent power to correct its record so as to reflect the truth and insure that justice be served").

At the initial proceeding on July 7, 2005, the Landlords' attorney agreed to a continuance. App. 7. An attorney with Law Students in Court, who was assisting Mr. Le that day, stated that the continuance was "with all rights reserved," and the Landlords' attorney did not express any contrary position. App. 8. At the subsequent hearing, the Landlords' attorney stated that he was "looking at an answer and a jury demand" (App. 13), indicating that the answer had been served on him. When the trial court indicated that it did not have an answer and jury demand, Ms. Fisher, a law student with Law Students in Court who was assisting the Tenants at the morning hearing, responded that the Tenants had an answer to file, but that "[t]he

[2] The rule states: "[a]ny party entitled to a jury trial, may demand a trial by jury . . . by filing a demand for such jury trial signed by the party or his attorney of record." SCR-LT Rule 6.

computers are down in the Clerk's office and they won't let us file them." *Id.* In response to the court's inquiry, she explained that the answer demanded a jury and asserted the defense of retaliation. *Id.*; *see* App. 21 (trial judge acknowledges the jury demand).

When the court reconvened at 4:45 in the afternoon, Ms. King immediately stated that "we've been trying since this morning to get the answer filed," and the court apologized, stating "I'm sorry about the computers but it's a quarter to five and I'm going to determine whether or not I have to continue the case for trial." App. 37. The court subsequently noted two times that the Tenants had previously informed the court that "they wanted time to file an answer and a jury demand." App. 38, 39. The court denied that request, in effect treating the Tenants' *pro se* oral presentation and testimony as the equivalent of the written pleading they unsuccessfully attempted to file. The Tenants orally presented denials and defenses that entitled them to a jury trial. At the close of the proceeding, Ms. King reiterated twice that she was requesting a trial by jury. App. 49-50.

The Landlords complain that the Tenants did not "proffer" their answer to the court. Landlords' Br. 8, 12. But while the *pro se* Tenants did not literally proffer their papers to the judge, who did not ask for them after he was told that the Clerk's office would not accept them for filing, they did, in fact, proffer the contents of the papers when asked to testify to the defense. Thus, the proceedings completely satisfied SCR-LT Rule 6. *Cf. Hight v. Tucker,* 757 A.2d 756, 760 (D.C. 2000) (transcript of proceeding may substitute for written findings required by statute to explain judicial deviation from Child Support Guidelines).

The *pro se* Tenants' timely invocation of their right to a jury trial, coupled with the presentation of denials and defenses requiring resolution at trial, contrasts with the cases that the Landlords cite in their brief. In *Dominique v. Kaiser*, 479 A.2d 319 (D.C. 1984), the tenants

requested a jury trial *20 months* after the complaint had been filed, and the Court held that the tenants there had waived their right to a jury trial by failing to file a timely jury demand. *Id.* at 323. The Court also held that there was no prejudice since the landlord would have been entitled to a directed verdict. *Id.* Here, in contrast, Tenants included their jury demand with their answer, which they attempted to file within the time allotted by the rules, and presumably would have been able to do had the Clerk's office computer been working properly. Moreover, the Tenants squarely put the Landlords' good faith at issue by demonstrating that Ms. Courbois, who claimed she intended to occupy the apartment, had never actually seen the inside of the apartment and had chosen not to move into vacant apartments in the same building. They also offered evidence that the real reason for the notice of eviction was to remove Tenants, who were attempting to assert their rights under the Rental Housing Act to force the Landlords to address the intolerable conditions of the apartment. *See* Tenants' Opening Br. 11. Neither the trial judge nor the Landlords suggested below that a directed verdict would have been appropriate, and even now the Landlords appear to agree that Tenants were entitled to a trial.

Similarly in *Williams v. Dudley Trust Foundation,* 675 A.2d 45 (D.C. 1996), the defendant did not request a jury trial until *three months after* filing his answer, and this Court upheld the trial court's denial of a jury trial both because the request was untimely and because the underlying claim was meritless as a matter of law. As in *Dominique,* the Court held that "[t]here was no role for a jury to play" in the case. *Id.* at 46.

The record also refutes the Landlords' waiver argument because the Tenants requested a continuance. Judge Weisberg initially indicated that he would grant the Tenants at least two days to identify an attorney and to prepare for trial, but he later ordered Tenants to return for trial

that afternoon. App. 15-16[3] Had the trial court granted a continuance, the Tenants would have been able to file the verified answer and jury demand on a day when the court's computer was working, as well as to secure the assistance of counsel and to develop evidence for trial. The court's insistence on proceeding on a day when the verified answer and jury demand could not be filed cannot constitute a valid waiver of the Tenants' constitutional right to a jury trial.

In addition to arguing that the Tenants waived their right to a jury trial, the Landlords hint that the trial court could have denied the Tenants a trial of any kind. Landlords' Br. 10. *Momenian v. Lustine Realty Co., Inc.,* 693 A.2d 1125 (D.C. 1997), on which the Landlords rely, says nothing more than that summary proceedings *may* be appropriate in landlord-tenant cases where there are no contested issues of fact, a point that has never been disputed in this case. *Momenian* does, however, provide a rebuttal to the Landlords' claim that Tenants should not be permitted to assert their claims because they have moved out of the apartment from which the Landlords seek to have them evicted. In *Momenian,* the tenants also vacated their apartment (after a fire), but they claimed that the landlord had the obligation to use insurance proceeds to repair the property. Similarly, in the instant case, the Tenants vacated the property temporarily because of intolerable conditions and housing code violations, but they made clear to the trial court that they always intended to move back into the apartment once it is repaired. App. 23. In *Momenian*, the issue was whether the building at issue was "untenantable," that is, beyond repair, but the court indicated that if the tenant could demonstrate that building could be repaired and if the tenant could defeat any other defenses that the landlord may have, he would be entitled to prevail. 693 A.2d at 1126. Similarly, if the Tenants here can show that Ms. Courbois did not

[3] As Judge Weisberg recognized, requiring Tenants to appear immediately for trial was contrary to the practice in the Superior Court. App. 39.

actually intend to occupy the premises or that the Tenants are being evicted in retaliation for a protected activity, they are entitled to prevail, and the fact that they have been forced to move out of the apartment has no bearing on this case.

II. The Tenants Properly Asserted a Retaliation Defense.

As explained in the Tenants' Opening Brief (13-17), the Tenants properly asserted a defense of retaliation. The retaliation defense was contained in the Tenants' Answer. App. 13. In addition, the Tenants presented evidence that they had withheld rent and made complaints in response to the Landlords' violations of the housing code and other District laws, including the Landlords' failure to provide heat and hot water, to repair the Tenants' kitchen after dismantling it, and to correct the rat infestation in the building. Tenants' Br. 16. The Tenants' actions were protected against landlord retaliation under D.C. law, and were sufficiently recent to give rise to a statutory presumption which the Landlords were obligated to rebut. *Id.*

The Landlords' argument that a retaliation claim cannot be made where the basis for the eviction is that the landlord intends to occupy the apartment has no basis in the law. First, the retaliation statute, D.C. Code § 42-3505.02(a), provides for no exception of this kind. Second, it is clear from the case law that an otherwise permissible action by a landlord is unlawful if done with a retaliatory intent. In *De Szunyogh v. William C. Smith & Company, Inc.*, 604 A.2d 1 (D.C. 1992), this Court established that "if a tenant alleges acts which fall under the retaliation eviction statute, D.C. Code § 45-2552 [currently 42-350.02], the statute by definition applies," even if the landlord otherwise would have had a lawful ground for evicting the tenant. *Id.* at 4 ("clarify[ing] for the trial court and for future litigants" that contrary language in *Wahl v. Watkis,* 491 A.2d 477 (D.C. 1985), should not be followed).

Two recent cases of this Court reinforce the understanding that a landlord is not entitled to sue for eviction or to take other adverse action against a tenant if its motive is retaliatory, even if the landlord would otherwise be entitled to take such action. In *Miller v. D.C. Rental Housing Commission,* 870 A.2d 556 (D.C. 2005), the Rental Housing Commission found that a landlord had engaged in retaliation against a tenant "based on evidence that, less than six months after petitioner joined a tenant organization, the housing provider for the first time sought to enforce against him a lease provision forbidding possession of dogs." *Id.* at 557 n.1. As both the Commission and the Court appeared to recognize, although a landlord ordinarily may seek the eviction of a tenant for violating a "no dogs" provision of a lease, the landlord cannot enforce such a provision if its reason for doing so is to retaliate against the tenant for engaging in protected conduct.

Similarly, in *Parreco v. D.C. Rental Housing Commission,* 885 A.2d 327 (D.C. 2005), the Court observed that a landlord, in defending its decision to increase the actual rent for a tenant's apartment, was not confined to the reasons enumerated in the Rent Stabilization Act for obtaining an increase in the rent ceiling. Accordingly, because the landlord had already received authorization to raise the rent ceiling for the tenant's unit well above the rent to be charged the tenant, "the Rent Stabilization Act was no bar to increasing the rent, provided the landlord did so according to the statutorily-mandated procedures, . . . and did not do so for an impermissible purpose, such as retaliation against tenants for exercise of certain protected actions." *Id.* at 336. It necessarily follows from the Court's reasoning that the rent increase, even if within the previously authorized ceiling, would have been unlawful had it been imposed for a retaliatory purpose.

Thus, while the law generally allows landlords to evict a tenant in order to recover possession of the apartment for their personal use, the retaliation statute prohibits these Landlords from evicting these Tenants because they exercised their right to seek repairs of housing code violations. The retaliation defense also raised a classic issue of fact that should have been decided by a jury. *See Donohoe & Drury, Inc. v. Crowther,* 108 Daily Washington Law Reporter 2407, 2410 (Sup. Ct. 1980) (Schwelb, J.) ("[t]he retaliatory eviction defense hinges on the landlord's intent").

* * * * * *

In conclusion, the decision below should be reversed and the case should be remanded with directions to certify the case to the Civil Division for a jury trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Reply Brief of Appellants Appendix to be delivered by first-class mail, postage prepaid, this 25th day of April, 2006, to counsel for Appellees: Stephen O. Hessler; Hessler & Associates; Suite 300; 1313 F. Street, NW; Washington, DC 20004.

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