Catholic University Law Review

Volume 31
Issue 4 *Summer 1982*

Article 16

1982

Landlord & Tenant

Patrick J. Heneghan

LANDLORD & TENANT

I. PROTECTIVE ORDER

A protective order is an equitable device created by the United States Court of Appeals for the District of Columbia Circuit[1] which issues upon the motion of the landlord and requires the tenant to deposit into the court registry his full monthly rent ("protective payments") for the period of litigation. Generally, the order issues when the landlord files a suit for the possession of property based on nonpayment of rent.[2] The order is designed to ensure that a landlord who is successful in a prolonged litigation will be able to recover rental income which accrued during the course of litigation.[3] In 1981, the District of Columbia Court of Appeals issued several significant decisions regarding the use and effect of protective orders.

A. Timeliness of Protective Payments

In the recent case of *Davis v. Rental Associates, Inc.*,[4] a tenant breached a protective order by failing to make the required protective payments. Nevertheless, the District of Columbia Court of Appeals held that the trial court abused its discretion by striking the tenant's pleadings for failing to comply with the protective order, and later, by failing to vacate its judgment.

The tenant in *Davis* raised two issues before the court of appeals: whether protective orders are consistent with the due process clause of the fifth amendment[5] and whether the trial court abused its discretion by not granting appellant's motion to vacate the default judgment.[6] Since the *Davis* court held that the trial court abused its discretion, it was unnecessary for the court to explore the possible constitutional tension between the due

1. *See* Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970).

2. *See generally* Cooks v. Fowler, 459 F.2d 1269 (D.C. Cir. 1971); Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970); Armwood v. Rental Assocs., Inc. 429 A.2d 190 (D.C. 1981); McNeal v. Habib, 346 A.2d 508 (D.C. 1975); National Capital Hous. Auth. v. Douglas, 333 A.2d 55 (D.C. 1975).

3. *See Bell*, 430 F.2d at 482.

4. 431 A.2d 23 (D.C. 1981).

5. *Id.* at 25.

6. *Id.*

process clause and the protective order.[7]

After the court issued a protective order, the tenant in *Davis* failed to make the required protective payments for November and December, 1979, and January 1980. At a hearing on February 12, 1980 (nine days before the scheduled trial on the merits) the trial court granted the landlord's motion for a judgment of possession based on the tenant's failure to comply with the protective order.[8] After obtaining a stay in the execution of the trial court's judgment, the tenant moved to vacate the judgment and informed the court that she was able immediately to pay the entire amount in arrears and proceed to trial the next day.[9] The trial court denied the motion to vacate. The court of appeals reversed and held that the trial court abused its discretion.

Although the court of appeals recognized that the ruling on a motion to vacate a judgment is a matter committed to the trial judge's discretion, it held that the strong judicial policy encouraging a trial on the merits will often justify reversal when even a slight abuse of discretion by the trial judge has occurred.[10] Given the preference for disposing of a case on the merits, the court of appeals concluded that the trial court abused its discretion by refusing to vacate its judgment when the scheduled trial date was close at hand.

In dissent, Associate Judge Kern maintained that the majority's position not only set an undesirable precedent, but unduly protracted the summary proceeding of the trial court by allowing tenant litigants to ignore court orders with impunity.[11] Judge Kern viewed the majority's decision as diluting the effectiveness and fairness of protective orders.

In *Mahdi v. Poretsky Management, Inc.*,[12] the District of Columbia Court of Appeals addressed the unresolved issue in *Davis*: the constitutionality of protective orders. The court held that where an indigent failed to comply with a court order for protective payments, his fifth amendment due process rights were not violated when the trial court disposed of his

7. *Id. But see* Mahdi v. Poretsky Management, Inc., 433 A.2d 1085 (D.C. 1981) and *infra* notes 12-20 and accompanying text.

8. *Davis*, 431 A.2d at 24-25.

9. *Id.* at 25. In dissent, Associate Judge Kern was not impressed by the tenant's willingness to pay the entire outstanding amount in arrears. He argued that making an exception in individual cases heightened the responsibility of the already overworked Landlord and Tenant Branch. *Id.* at 26 (Kern, J., dissenting).

10. *Id.* at 25 (citing Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979); Jones v. Hunt, 298 A.2d 220, 221 (D.C. 1972)).

11. *Davis*, 431 A.2d at 26 (Kern, J., dissenting).

12. 433 A.2d 1085 (D.C. 1981) (per curiam). Associate Judge Kern, who dissented in *Davis*, joined the court's opinion in *Mahdi*.

claim and granted the landlord possession without a hearing on the merits.[13]

The court of appeals disposed of the tenant's due process argument by concluding that the unique factual and legal characteristics of the landlord-tenant relationship warrant either the imposition of a swift, judicially supervised mechanism for the landlord to recover his property or the creation and maintenance of a procedure where the landlord will be assured of back-rent if he prevails on the merits.[14] The court of appeals cited and adopted the rationale of the Supreme Court in *Lindsey v. Normet*.[15] In *Lindsey*, the Court upheld the constitutionality of an Oregon statute which provided that the tenant was required to post security for accruing rent in the event that the possessory action was not tried within six days. The Supreme Court rejected the tenant's contention that housing was a fundamental constitutional right.[16] Since the security agreement would facilitate rather than frustrate the landlord's right to the income, the Supreme Court concluded that the security agreement was a viable alternative in the event that swift repossession was not realized.

The District of Columbia Court of Appeals recognized that while striking the tenant's pleadings necessarily terminates the tenancy, it would not foreclose the tenant's opportunity to sue the landlord on a breach of contract action in the Civil Division.[17] The court also recognized that if tenants were permitted to litigate after failing to comply with protective orders, this would undoubtedly reduce the already shrinking supply of rental housing in the District of Columbia. Accordingly, it affirmed the trial court's decision.

Theoretically, *Mahdi* and *Davis* are not inconsistent. *Mahdi* stands for the proposition that protective orders are not violative of the due process clause. *Davis* represents the rule that although protective orders are not violative of the due process clause per se, the trial court must weigh the equities involved before striking the tenant's pleadings for noncompliance with the protective order or before refusing to vacate a default judgment.

Practically, however, *Mahdi* and *Davis* are inconsistent. They encourage undue speculation as to the equities involved in each case. Judge Kern's dissent in *Davis*, later vindicated when he joined the plurality in *Mahdi*,

13. *Id.* at 1086.

14. *Id.* at 1088-89. The court noted that because the tenant was in possession of the landlord's property, the tenant could deprive the landlord of both possession and rent until the landlord sued for repossession.

15. 405 U.S. 56 (1972).

16. *Id.* at 74.

17. *Mahdi*, 433 A.2d at 1089-90.

shows the inherent unfairness and burden placed on the trial judge and the landlord litigant if the tenant is allowed to maintain his cause of action.

The approach taken by the *Davis* court is difficult to reconcile with its facts. Despite the trial court's conclusion that the tenant willfully violated the terms of the protective order (i.e., the failure to make payments for three months, the failure to request permission to make late payments, the late payment of rent during the preceding two months, and the tenant's failure to advise her attorney of her nonpayment),[18] the court of appeals found an abuse of discretion. *Davis* indicates that a tenant who proffers the entire amount in outstanding protective payments before trial will be afforded the opportunity to proceed to trial on the merits, despite the default on protective payments.

The confusion generated by *Davis* and *Mahdi* is exacerbated by the District of Columbia Court of Appeals' summary affirmance of a lower court's decision to strike a tenant's answer where he failed to make three payments as required by a protective order. Although the unpublished decision of *Diamond v. Central City Property Management Co.*[19] does not have precedential value, it nevertheless supports the rationale and result reached in *Mahdi*.

The approach taken by the *Mahdi* court is better supported by legal reasoning and precedent. Although the *Mahdi* court was sensitive to the rare circumstances where the imposition of a protective order and the consequent judgment of possession would at times "make any human judge wince and grit his teeth,"[20] it upheld the validity of the protective order as a tool to maintain the delicate balance between landlord and tenant rights.

B. Disbursement of Protective Payments

Frequently, when a landlord initiates a possessory action, the tenant will counterclaim, asserting that the nonpayment of rent was due to the existence of housing code violations.[21] The tenant will still be required to pay protective payments into the court, although, generally, the payments will not be disbursed until there is a final disposition on the merits. This proce-

18. *Davis*, 431 A.2d at 25.

19. No. 80-769 (D.C. Mar. 19, 1981).

20. 433 A.2d at 1088.

21. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). In this important decision, the United States Court of Appeals for the District of Columbia Circuit interpreted the District of Columbia Housing Regulations as implying a warranty of habitability in all leases. Thus, a housing code violation will breach this warranty resulting in the suspension of the tenant's rental obligation. When the landlord sues for possession, the tenant may raise the code violations as an equitable defense to the nonpayment of rent.

dure provides the landlord with an adequate opportunity to prove that the tenant unjustifiably failed to make the rental payments, without jeopardizing the tenant's opportunity to prove the existence of housing code violations.

In *McNeal v. Habib*,[22] the District of Columbia Court of Appeals examined the procedure to dispose of protective payments in the event the possessory action never comes to trial. In *McNeal*, the lower court failed to grant the tenant an evidentiary hearing to determine whether the rental value should be abated due to the alleged housing code violations.[23] Rather, it simply released the protective funds to the landlord when the possessory action became moot.[24] Because a trial on the merits was never conducted, the tenant was precluded from proving either the existence of housing code violations or the reduced fair rental value of the property. The court of appeals reversed, concluding that due process considerations entitled the tenant to prove the abated rental value during the period of occupancy "while the protective order was in effect."[25]

In the recent case of *Armwood v. Rental Associates, Inc.*,[26] the District of Columbia Court of Appeals expanded *McNeal* and held that, although an existing settlement agreement between the tenant and the landlord will prevent the tenant from claiming a diminution in rental value due to housing code violations that existed before the settlement agreement, the landlord's failure to correct the violations requires an evidentiary hearing on whether any future rent should be reduced.[27]

Under a protective order granted on defendant's motion, the tenant in *Armwood* was required to pay rent for February and March, 1979, into the court registry pending a trial on the merits.[28] In a subsequent settlement, the landlord and tenant agreed that the money already paid into the court would be divided equally, the tenant would pay the April rent directly to the landlord, and the landlord would make all the itemized repairs by April 30, 1979. If the landlord did not make the prescribed repairs, the tenant would be allowed to pay May's rent to the court.[29] The landlord failed to make the requisite repairs by April 30; accordingly, the tenant paid the rent for May, June, and July, 1979 into the court registry.[30]

22. 346 A.2d 508 (D.C. 1975).
23. *Id.* at 510-11.
24. *Id.* at 511.
25. *Id.* at 514.
26. 429 A.2d 190 (D.C. 1981) (per curiam).
27. *Id.* at 191.
28. *Id.* at 190-91.
29. *Id.* at 191.
30. *Id.*

Although the housing code violations were not corrected for more than three months after the settlement, the trial judge ordered that the protective payments be released to the landlord upon learning that the landlord completed the repairs on August 8, 1979. In addition, the trial court barred the tenant from introducing evidence of existing violations and their effect on the value of the rental unit during that time. The court of appeals reversed, finding that the landlord's untimely completion of repairs would not moot any of the tenant's additional claims for abatement in rental value.[31]

Thus, *Armwood* represents the logical extension of *McNeal*. *Armwood* ensures that, regardless of whether the tenant has entered into a settlement agreement, a breach of that settlement agreement by the landlord will enable the tenant to assert his rights. If a party agrees to settle, he will only be estopped from bringing suit on terms which conflict with the settlement agreement. Although, in *Armwood*, only the timetable for the completion of repairs was at issue, the *Armwood* rationale may be extended to include other breaches of settlement agreements. *Armwood* advances both the tenant's due process rights and the "settlement agreement" as alternatives to a disposition on the merits.

C. Appealability of Protective Orders

In *Dameron v. Capitol House Associates Limited Partnership*,[32] the District of Columbia Court of Appeals held that the protective order had no permanent impact on the rights of the parties; it was merely a preliminary action by the lower court and not a final order within the meaning of section 22-721(a)(1) of the D.C. Code.[33] Therefore, the protective order was not appealable to the District of Columbia Court of Appeals.

The tenants in *Dameron* refused to pay an increase in rent authorized by the District of Columbia Rental Accommodations Office. Instead, they merely tendered their checks in the amount of the old rent. Accordingly, the landlord filed suit for possession based on nonpayment of rent and subsequently moved for a protective order. In addition, the landlord requested that he be allowed to withdraw from the court registry the "old" rent, leaving only the amount of the disputed increase in the registry.[34]

---

31. *Id.*

32. 431 A.2d 580 (D.C. 1981). For a complete discussion of the *Dameron* decision, see Note, *Dameron v. Capitol House Associates Limited Partnership: Protective Orders to Provide Rent Collecting, Loophole for Landlords?* 31 CATH. U.L. REV. 615 (1982).

33. *Dameron*, 431 A.2d at 585. Section 22-721(a)(1) is currently codified at D.C. CODE ANN. § 11-721(a)(1) (1981).

34. 431 A.2d at 582. The tenants alleged housing code violations in order to compel the

After a hearing, the lower court ruled that the fund which was "preserved in the registry . . . was much more than adequate to fully protect the defendants' [tenants] need for any security . . . ."[35] Consequently, the lower court ordered that portion of the protective payments which constituted the "old," undisputed rent to be released to the landlord. The tenants were subsequently denied a stay of the lower court's order in both the lower court and the court of appeals.[36] The tenants appealed arguing that the order violated *McNeal v. Habib*[37] because the lower court released the funds without a full evidentiary hearing. The court of appeals dismissed for lack of jurisdiction because the lower court's order was neither a "final" order nor an order that came under the appeal provisions of section 11-721(a)(2) of the D.C. Code.[38]

Concluding that a protective order was merely a preliminary interim order of a provisional nature which effects no permanent disposition of the property,[39] the court of appeals held that the protective order did not satisfy the requirements of a final order.[40] The court was persuaded that a protective order, being a creature of equity,[41] could be revised at any time during the action.[42] Furthermore, the purpose of the protective order was to ensure that the harm of excessive delay attendant in landlord-tenant disputes was mitigated.[43] To permit the protective order itself to be appealable would frustrate this basic value because appealability would cause additional delay in the summary process of the landlord-tenant proceeding.[44]

In the alternative, the tenants argued that the protective order was appealable as an interlocutory order under section 11-721(a)(2)(C) of the

---

court to reject the landlord's request for a "pass through" of the "old," undisputed rent. The lower court held that the de minimis nature of the claim combined with the fact that the violations had been remedied, mitigated against the validity of the tenants' claims. Apparently, the tenants were attempting to exert economic pressure on the landlord in their effort to cut off his access to rental income.

35. *Id.*

36. *Id.*

37. *See supra* notes 22-25 and accompanying text.

38. *Dameron*, 431 A.2d at 582.

39. *Id.* at 584.

40. *Id.* at 586.

41. *Id.* at 583-84.

42. *Id.* at 585.

43. *Id.* at 586.

44. *Id.* The court of appeals did, however, note one caveat to the *Dameron* holding. If the trial court's order directs immediate execution of judgment or delivery of property to a litigant, and the opposing party suffered or will suffer irreparable injury as a result of the order, the court of appeals will not foreclose review.

D.C. Code.[45] This statute allows the court of appeals to hear cases resulting from orders "changing or affecting the possession of property."[46] The court of appeals was unconvinced that the statute permits a protective order to be appealed. First, since the statute was designed to maintain the status quo between parties regarding property, and since the protective order was intended to protect the status quo between the landlord and the tenant, no statutory goal would be advanced by allowing an appeal.[47] Second, the statute was inapplicable because money was the only type of property which was exchanged or affected. Since any danger of loss could be remedied at the conclusion of the litigation, the danger which section 11-721(a)(2)(C) was designed to prevent did not exist here.[48]

Dameron represents an attempt by the court of appeals to disarm the tenant of a dilatory weapon which could potentially erode the effectiveness of a protective order.[49] Had the *Dameron* court held that the protective order was appealable, the delicate balance which the protective order was designed to effect between landlord and tenant could have been destroyed. Not only would the landlord have to forego rent until the commencement of a suit for possession, but he would have to wander through a procedural maze before he would receive any equitable relief. In addition, because an appeal of a protective order would stay any interim payments that the court may have granted during the trial, the landlord could suffer a great deal of harm as a result of his former rental income being tied up in the court registry.

II. NOTICE

Under the provisions of the Rental Housing Act of 1977,[50] a tenant violating an obligation of the tenancy may not be evicted unless proper notice

45. 431 A.2d at 587.

46. D.C. CODE ANN. § 11-721(a)(2)(C) (1981).

47. *Dameron*, 431 A.2d at 587. The court reasoned in *Dameron* that the protective order preserved the status of the parties which existed prior to the controversy: the landlord received the "old" rent and the tenant remained in possession of the property.

48. *Id.*

49. The tenants in *Dameron* were attempting to prevent the landlord from effecting a valid and approved rent increase. Not only did they appeal the issuance of the protective order and the subsequent release of protective funds, but they also raised de minimis housing code violations in order to avoid payment of any protective funds. The court of appeals refused to permit the protective order from becoming an economic weapon of unreasonable proportion.

50. D.C. CODE ANN. §§ 45-1681 to 45-1699.27 (Supp. VII 1980). The Rental Housing Act of 1977 has expired and been replaced by the Rental Housing Act of 1980, D.C. CODE ANN. §§ 45-1501 to 45-1597 (1981).

is served, informing the tenant of the violation.[51] The tenant must then receive notice to quit[52] as a condition precedent to a suit for possession. The question presented in the recent case of *Jones v. Brawner Co.*[53] was whether technically defective service of the notice to quit would be a valid defense in a suit for possession where the tenant had actually received notice to quit.

According to a Rental Accommodations Commission regulation[54] promulgated under the Rental Housing Act of 1977,[55] the tenant is estopped from defending a suit for possession on the grounds of defective service where the tenant has actual notice. Under section 45-906 of the D.C. Code,[56] however, actual receipt of notice to quit will not bar a tenant from defending on the ground of improper service. Concluding that the Rental Housing Act of 1977 intended to supplement rather than supplant tenants' rights, the District of Columbia Court of Appeals in *Jones* held that the notice provisions of section 45-906 controlled over the Commission's regulation.[57] Accordingly, the court held the regulation was inapplicable where proper service of the notice to quit was disputed.[58]

The landlord in *Jones* sued for possession of the tenant's apartment based on the tenant's alleged willful and consistent failure to pay rent promptly on the first of each month as required by the lease. Subsequently, the landlord served the tenant with a notice to quit.[59] Instead of serving the notice in compliance with section 45-906, the landlord merely slipped

51. D.C. CODE ANN. § 45-1699.6(b)(1) (Supp. VII 1980) (currently codified at D.C. CODE ANN. § 45-1561(b) (1981)).

52. A notice to quit is a written notice given by a landlord to a tenant which informs the tenant of the landlord's desire to repossess the property. The tenant is required to leave the premises at a time designated in the notice to quit.

53. 435 A.2d 54 (D.C. 1981).

54. *See* 25 D.C. Reg. 2652 (1978). The regulation provides in part: "[a]ctual receipt of service shall bar any claim of defective service except for timeliness."

55. The Commission's regulation was promulgated under D.C. CODE § 45-1699.26(a)(4) (Supp. VII 1980) (currently codified at D.C. CODE ANN. § 45-1595(a)(4) (1981)), which states that service upon a person may be completed by "any other means that is in conformity with an *order of the Commission* or the Rent Administrator in any proceeding." (emphasis added).

56. D.C. CODE § 45-906 (1973) provides:

> *Every notice* to the tenant to quit shall be served upon him personally, if he can be found, and if he cannot be found it shall be sufficient service of said notice to deliver the same to some person of proper age upon the premises, and in the absence of such tenant or person to post the same in some conspicuous place upon the leased premises.

(emphasis added) (currently codified at D.C. CODE ANN. § 45-1406 (1981)).

57. *Jones*, 435 A.2d at 55-56.

58. *Id.* at 56.

59. *Id.* at 54.

the notice under the tenant's apartment door.[60] Notwithstanding that the service of the notice was defective, the lower court found sufficient evidence to conclude that the tenant had actual notice.[61] Consequently, the lower court ruled that the notice was properly served under the Rental Housing Act.

On appeal, the District of Columbia Court of Appeals reversed. The court reasoned that because the Rental Housing Act was designed to give the tenant the additional safeguard of receiving a notice to cure (a notice to the tenant that if he continues to violate the terms of the lease the landlord may begin eviction proceedings),[62] it was inappropriate to apply the Commission regulation here when dealing with a notice to quit. Additionally, since the Rental Housing Act did not amend the clear requirements of section 45-906,[63] it was reasonable to conclude that section 45-906, rather than section 45-1699.26 of the Rental Housing Act, would continue to control in notice to quit disputes.

Although the Rental Housing Act of 1977 has expired and has been replaced by the Rental Housing Act of 1980, *Jones* has continuing applicability because the notice provisions of the 1977 Act have been incorporated verbatim into section 45-1595 of the 1980 Act.[64] The *Jones* rationale instructs the Rental Accommodation Commission to consider other provisions of the D.C. Code which deal with landlord-tenant matters when drafting and promulgating its regulations. Furthermore, *Jones* mandates that absent an express amendment to section 45-906,[65] any service of notice to quit which does not comply with the provision will be struck down as defective. Personal service on the tenant continues as the clearly preferred method; any substituted service should be employed only as a last

60. *Id.*

61. *Id.* at 55.

62. *Id.* The notice to cure, which is required under the Rental Housing Act of 1977, is neither a substitute for nor an addition to the notice to quit. It is intended to supplement the existing statutory protections afforded the tenant. The notice to cure merely entitles the landlord, at his election and after the tenant has failed to cure the alleged violation in the thirty day statutory period, to begin the eviction proceedings. Consequently, the landlord must still file the notice to quit in accordance with § 45-906 if he elects to begin the eviction process.

63. Although the Rental Housing Act of 1977 did repeal the Rental Accommodations Act of 1975, D.C. CODE §§ 45-1631 to 45-1674 (Supp. V 1978), it did not modify or amend the provisions of § 45-906.

64. D.C. CODE ANN. § 45-1595(a)(4) (1981).

65. Section 45-906 of the 1973 D.C. Code is currently codified at D.C. CODE ANN. § 45-1406 (1981).

resort and only in strict compliance with section 45-906.[66]

Patrick J. Heneghan

66. *See* Moody v. Winchester Management Corp., 321 A.2d 562, 564 (D.C. 1974).