1982

Dameron v. Capitol House Associates Limited Partnership: Protective Orders to Provide Rent Collection, Loophole for Landlords?

Susan E. Patrick

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol31/iss3/14

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
Since 1970, the courts of the District of Columbia have used protective orders in landlord-tenant disputes for the dual purposes of protecting landlords from losing rent that accrues during litigation and safeguarding tenants from eviction for nonpayment of rent at the conclusion of the suit. This procedural device requires tenants to pay rent into the court registry as it comes due during a suit for repossession of the landlord's premises where tenants assert a defense, pursue an appeal, or request a jury trial. The escrow fund that results from such rental deposits is disbursed at the conclusion of the suit, according to the determination of the trial court. If housing code violations are found, rental charges for the litigation period are abated accordingly, with the tenant receiving the difference.
ment is also appropriate if either party amends his complaint or answer to allege a change in the condition of the premises during the litigation. If the tenant abandons the premises prior to trial, any money deposited in the court registry must be apportioned between the landlord and the tenant following a hearing to determine the rights of the parties.

The tenant's most effective tactic in a landlord-tenant controversy is the withholding of rent. Deposit of rent into the court registry promotes the utility of this tactic, while assuring the landlord of the recovery of rent if he prevails. By withholding rent, the tenant subjects the landlord to financial pressure that might force settlement of the dispute. Traditionally, the courts in the District of Columbia have encouraged this tactic by refusing to release funds from the court registry until a final determination of the rights of both parties has been made.

Recently, however, the District of Columbia Court of Appeals, in Dameron v. Capitol House Associates Limited Partnership, permitted the release of funds deposited in the court registry to the landlord during the litigation. This decision may signal the initiation of more sympathetic

---

7. See id.
9. The tenant tactic of rent withholding received impetus in Chicago in 1961, as a weapon against slumlords. When the Cook County Department of Public Aid found itself inadvertently subsidizing a substantial number of slum dwellings, it withheld rent payments. Withholding Rent: a new weapon added to arsenal for war on slumlords, 21 J. OF HOUSING 64, 67 (1964).

A Model Housing Law, proposed by Lawrence Veiller in 1914, contained a provision for rent withholding if the rental unit did not comply with the health codes. This rent withholding provision was retained by very few cities and states that adopted Veiller's Model Housing Law proposal. Even when retained, the provision for rent withholding proved largely ineffective since it applied only to buildings constructed after adoption of the provision. Id. at 68.

Recent discussions of rent withholding have reiterated that its main purpose is to give the tenant power to put pressure on the landlord to restore substandard housing and deter its further degeneration. See, e.g., Dorfmann v. Boozer, 414 F.2d 1168 (D.C. Cir. 1969); King v. Moorehead, 495 S.W.2d 65 (Mo. 1973); 176 E. 123 St. Corp. v. Flores, 65 Misc.2d 130, 317 N.Y.S.2d 150 (1970); DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971); Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978); Restatement (Second) of Property § 11.3 (1977). Cf. Comment, Rent Withholding Won't Work: The Need For a Realistic Rehabilitation Policy, 7 L.oy. L.A.L. REV. 66 (1974).

11. In the District of Columbia, specific requests for direct payment to the landlord, as well as requests for disbursement of funds in the escrow account to the landlord during litigation, have been rejected both before and after a protective order procedure was adopted. See Cooks v. Fowler, 437 F.2d 669, 676 n.39 (D.C. Cir. 1971); Dorfmann v. Boozer, 414 F.2d 1168 (D.C. Cir. 1969).
treatment of the landlord by the District of Columbia courts in landlord-tenant disputes.

In Dameron, the District of Columbia Rental Accommodations Office\(^\text{13}\) authorized a rent increase for the landlord, Capitol House Associates.\(^\text{14}\) When the increase became effective, some of the tenants continued to pay the former rental amount. Capitol House Associates filed suit for possession of those tenants' units based on their nonpayment of rent.\(^\text{15}\) Following the tenants' request for a jury trial, Capitol House Associates filed a motion for a protective order to require the tenants to pay the full monthly rent into the court registry and to release the original rental amount to Capitol House Associates during the lawsuit.\(^\text{16}\) The trial judge entered the protective order as requested, over the tenants' objections.\(^\text{17}\) On appeal, the court of appeals held that a pretrial protective order is not appealable and that this order was properly framed.\(^\text{18}\)

This Note will examine the historical development of protective orders in landlord-tenant disputes in the District of Columbia. It will analyze the court’s decision in Dameron and demonstrate that its application should be limited to the narrow circumstances of the case. Finally, this Note will comment on the potential of the Dameron decision to weaken the effectiveness of rent withholding by tenants in a landlord-tenant dispute.

I. Historical Development of Protective Orders in the District of Columbia

The use of protective orders in landlord-tenant disputes developed in conjunction with the adoption of the doctrine of implied warranty of habitability\(^\text{19}\) for leases of urban dwellings.\(^\text{20}\) This doctrine was enunciated for


\(^\text{14}\) 431 A.2d at 581.

\(^\text{15}\) Id. at 582.

\(^\text{16}\) Id.

\(^\text{17}\) Id.

\(^\text{18}\) Id. at 584.

the first time in the District of Columbia in *Javins v. First National Realty Corp.* In *Javins*, the United States Court of Appeals for the District of Columbia Circuit reversed a District of Columbia appellate court decision that prohibited tenants from asserting housing code violations as a defense to an action for eviction based on nonpayment of rent. The court held that a warranty of habitability is implied for all dwellings covered by the Housing Regulations of the District of Columbia. In adopting this implied warranty, the court stated that the common law rule relieving the landlord of any burden of maintaining rental units was inconsistent with the housing code and the nature of modern housing. It held that the landlord's breach of the implied warranty gives rise to all the remedies available for breach of contract and that the tenant's obligation to pay rent depends on the landlord's performance of his obligations to maintain


20. Adoption of the implied warranty of habitability through statute or court decision has not solved the problem of substandard housing for the urban dweller that it was designed to address. See *Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976); *Chused, Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385 (1979).


22. In reaching its decision, the court considered the acute housing shortage in the District of Columbia, the inequality of bargaining power between the landlord and the tenant, the growth in consumer protection law, and the tenant's interest in securing decent housing. 428 F.2d at 1072, 1076-77.

23. *Id.* at 1072-73.

24. *Id.* at 1076-77. The court indicated that the common law rule was based on the realities of an agrarian, not an urban, society. Such realities had little application to the situation faced by the modern apartment dweller. While a member of an agrarian society generally had an interest in the land, the modern apartment dweller is more concerned with decent housing. *Id.* at 1077-79. The city dweller's search for adequate housing becomes more difficult in a tight rental market. The rental housing shortage in the District of Columbia has been a continuing problem. In 1975, the Committee on Housing and Community Development of the District of Columbia found that the rental vacancy rate was only 2.7%. This rate is sufficiently low to constitute an emergency under Department of Housing and Urban Development guidelines. The Committee further noted that the supply of low and moderate income rental housing was continuing to decrease, and indications pointed to a continuation of that trend. *Hearings and Disposition Before the Subcomm. on Commerce, Housing, and Transportation of the Comm. on the District of Columbia: First Session on H. Con. Res. 399 to Disapprove the District of Columbia Rental Accommodations Act of 1975, reprinted in 1 COMM. ON THE DISTRICT OF COLUMBIA, MISCELLANEOUS HEARINGS, 94TH CONG., 1ST SESS. (1975).* See infra note 127.

25. 428 F.2d at 1082 n.61.
the premises in a habitable condition.26 During the dispute, the tenants in Javins offered to pay their rent into the registry of the court as it came due.27 The court accepted this offer and further suggested that such a procedure would be appropriate whenever tenants in possession seek to defend against an eviction action for nonpayment of rent by alleging that the landlord breached the implied warranty of habitability.28 The court stated that the money in the court registry should be apportioned on the basis of the actual rental value of the premises as determined at trial.29 Finally, if either party alleges any change in the condition of the premises during the trial, the later disbursement of money in escrow should accordingly be apportioned with respect to this change.30

II. PROCEDURAL DEVELOPMENT IN THE USE OF PROTECTIVE ORDERS

A. Pretrial Protective Orders

Five weeks after Javins, the United States Court of Appeals for the District of Columbia Circuit, in Bell v. Tsintolas Realty Co.,31 formally adopted a protective order procedure for establishing a rental escrow fund in the court registry during litigation of landlord-tenant controversies. In Bell, the tenants asserted a Javins defense in response to the landlords’ action for eviction based on nonpayment of rent.32 The landlords filed a motion for an order requiring the tenants to deposit their rent into the court registry as it came due.33 The trial court granted the motion,34 and the tenants sought a stay of the order in the District of Columbia Court of Appeals.35

26. Id. at 1082.
27. Id. at 1083 n. 67.
28. Id.
29. Id. The court stated that “[a]s a general rule, the escrowed money should be apportioned between the landlord and the tenant after trial on the basis of the finding of rent actually due for the period at issue in the suit.” Id.
30. Id.
31. 430 F.2d 474 (D.C. Cir. 1970). In Bell, the court had consolidated several cases involving nonpayment of rent in which the landlords had sought protective orders to require the tenants to deposit their rent into the court registry as it came due. Id. at 478-79.
32. Id. at 477 n.3. The landlords in the District of Columbia had had two options when seeking repossession of rental units due to the tenants refusal to pay the stipulated rent. They could enter a complaint for summary possession or a complaint for possession and the rent in arrears. See id. at 477 n.5. In a suit for summary possession, the tenant is not permitted to enter any defense other than his payment of the rent.
33. Id. at 478.
34. Id.
35. Id. at 478-79.
The appellate court first considered the rationale for imposing or rejecting the protective order sought by the landlords. It noted that the issuance of such a protective order is an extraordinary variation from judicial tradition.\textsuperscript{36} Ordinarily, a plaintiff has no guarantee that a defendant will have sufficient funds to cover any judgment rendered against him. The court was wary of upsetting the balance of tactics in landlord-tenant cases in favor of landlords by initiating a rent collection procedure,\textsuperscript{37} and suggested that requiring an indigent tenant to pay rent into the court registry in order to assert a defense might restrict that tenant's access to the legal system.\textsuperscript{38}

The court recognized, however, that the landlord was now exposed to increased risk of loss since the summary nature of a suit for possession had been altered to permit the tenant to assert defenses and request a jury trial.\textsuperscript{39} The potentially protracted litigation could deprive the landlord of

\textsuperscript{36} Id. at 479-81. The court recognized that pre-judgment attachment is sparingly used in the District of Columbia. D.C. CODE ANN. § 16-501 (1981) requires the plaintiff to show that the defendant is about to evade service of process or to transfer the contested property out of the court's jurisdiction. In addition, the plaintiff is required to post a bond double the amount of his claim. Id. § 16-501(e).

\textsuperscript{37} 430 F.2d at 480-81. The court stated: "We have previously viewed the struggle between tenants and landlords as involving 'a variety of closely balanced legal and tactical approaches' and have been wary of tipping that balance in favor of the landlord by authorizing a rent collection procedure outside the scope of the 'panoply of legal remedies' provided him by the District of Columbia Code." Id.

Additionally, the court relied on Dorfmann v. Boozer, 414 F.2d 1168 (D.C. Cir. 1969). In Dorfmann, the tenants had formed an organization to deal with the landlord about matters concerning their tenancy. Alleging housing code violations, the tenants withheld their rent and paid it into a bank account opened by their tenant organization. The landlord sought an injunction to compel the organization to turn the funds over to him. The trial court, finding that the landlord was without operating funds, had a monthly deficit of $23,000, and had a loan in default thereby facing imminent foreclosure, granted the injunction. On the tenants' appeal, the court of appeals reversed, recognizing that there is statutory provision for attachment prior to judgment in landlord and tenant actions. Id. at 1171. Further, the court noted that alleviating the financial hardship of the landlord by turning over the tenants' funds places the tenants at risk. Id. at 1173. Since the landlord put up no bond, if the tenants eventually prevail on the merits of their defense, they will be unable to recover their funds should the landlord subsequently become insolvent. Id.

\textsuperscript{38} 430 F.2d at 479-81. While the court, in Bell, expressed concern that requiring a tenant to pay rent into the court registry may indirectly inhibit access to the courts of indigent tenants, the United States Supreme Court, in Lindsey v. Normet, 405 U.S. 56 (1972), upheld an Oregon statute requiring rental payment during the period of litigation.

\textsuperscript{39} Bell, 430 F.2d at 481-82. Rule 6 of the Supreme Court of the District of Columbia, Landlord and Tenant Rules, gave the tenant the right to request a jury trial upon timely demand. In Pernell v. Southall Realty, 416 U.S. 363 (1974), the United States Supreme Court held that a tenant was entitled, by virtue of the seventh amendment, to a jury trial of a suit brought by a landlord for possession. See also supra note 32.
income from the premises for months. This would be particularly unfair where the landlord ultimately prevails, but the tenant does not have sufficient resources to pay the judgment. Secondly, the court noted that a protective order requires the tenant to deposit rent only as it comes due, an obligation the tenant should find "neither heavy nor unexpected."

After considering the equities, the court concluded that the payment of rent into the court registry is an appropriate compromise of both parties' interests. The use of a protective order enables the tenants to exert pressure on the landlord to resolve the conflict while assuring the landlord that he will eventually receive the amount of rent to which he is entitled.

The court then examined the procedure under which protective orders should be applied in landlord-tenant disputes. The court authorized their issuance but did not favor their indiscriminate use. It required that such protective orders be issued on a case-by-case basis and only when the tenant has either asserted a defense or requested a jury trial. Furthermore, the landlord must file a motion for a protective order and serve notice of that motion on the tenants. The court will then hold a hearing at which the tenants may argue against the motion, while the landlord must adequately demonstrate an obvious need for the protective order.

The court noted, however, that the landlord's need alone is not a sufficient basis on which to issue the order. The trial judge must also consider the merits of the tenant's defense, the extent of any housing code violations, and any response of the landlord if he was notified of the defects.

---

40. For example, in Dameron, the suit had continued for 14 months without resolution.
41. 430 F.2d at 482.
42. Id.
43. Id. The court stated that a protective order is "an equitable remedy to avoid placing one party at severe disadvantage during the period of litigation." Id.
44. Id.
45. Id. at 479. The court explicitly stated that "such prepayment is not favored and should be ordered only in limited circumstances." Id. The use of protective orders at both the pretrial and appellate stage of litigation in landlord-tenant controversies, however, has become the norm rather than the exception. Thousands of such orders are entered annually. See, e.g., Mahdi v. Poretsky Management, Inc., 433 A.2d 1085 (D.C. 1981); Morrissette Real Estate v. Hunt, 109 D. Wash. L. Rep. 901, 904 (Super. Ct. D.C.) April 8, 1981. See also Cooks v. Fowler, 437 F.2d 669, 672 (D.C. Cir. 1971).
46. Bell, 430 F.2d at 483.
47. Id. at 483-84. Among the factors a trial judge may consider in determining whether the landlord's need for a protective order exists are the amount of rent alleged to be due, the number of months the landlord has not received even a partial payment, the reasonableness of the rent, the amount of the landlord's monthly obligations for the premises, whether the tenant has been allowed to proceed in forma pauperis, and whether the landlord faces a substantial threat of foreclosure. Id. at 484.
48. Id.
In addition, if the trial judge determines that the tenant has made a strong showing of housing code violations or has spent a portion of the rent due on repairs of the premises, he may order that a proportionately decreased amount be paid into the court registry rather than the original contract rate. Finally, the court stated that the funds in the escrow account should be disbursed at the conclusion of the trial, according to the trial court's determination as to the proper amount to which each party is entitled.

B. Protective Orders in the Appellate Process

In *Cooks v. Fowler,* the United States Court of Appeals for the District of Columbia Circuit confronted the role of the protective order in the appellate process. In *Cooks,* the landlord was a seventy-nine year old widow who sought possession of her rental unit when the tenant failed to pay the rent due. She claimed that she was dependent on the rental income and alleged that the operating deficit on the building had reached $3,500 and was still mounting. When judgment was entered for the landlord, the tenant sought a stay of eviction pending appeal. The trial court granted a stay, subject to a protective order requiring the tenant to pay the full monthly rent into the court registry as it came due. The tenant challenged this order in the United States Court of Appeals for the District of Columbia.

49. *Id.* at 484-85. Later decisions have indicated that, while a tenant may be entitled to pay a reduced rent, a tenant is not entitled to live rent free, except for the period of time the court determined housing code violations were so major as to call for a full set-off. See, e.g., *Mahdi v. Poretsky Management, Inc.,* 433 A.2d 1085 (D.C. 1981) (landlord given possession of premises for tenant's failure to comply with protective order); *Morrissette Real Estate v. Hunt,* 109 D. Wash. L. Rep. 901 (Super. Ct. D.C.) April 8, 1981 (landlord sought to strike tenant's pleadings for her failure to comply with a protective order. The tenant's inability to pay is not a defense to a possessory action. The tenant may pursue her contractual rights in another forum).

50. 430 F.2d at 485. Accordingly, the trial court may determine that no substantial housing code violations exist, entitling the landlord to the full rent, or that the violations are so severe that the tenant's obligation to pay rent is nullified, or that some portion of rent is owed to the landlord with the tenant receiving the difference. *Id.*

51. 437 F.2d 669 (D.C. Cir. 1971). At the outset, the tenant challenged the granting of a stay of eviction conditioned on compliance with a protective order pending appeal. This condition was upheld by the court. 437 F.2d 669 (D.C. Cir. 1971). The trial court subsequently required payment of the full rental amount although the premises were in violation of the housing code. The tenant then appealed the amount required to be deposited pursuant to the protective order. 459 F.2d 1269 (D.C. Cir. 1971).

52. *Id.* at 674 n.25.

53. *Id.*

54. *Id.* at 671.

55. *Id.*

56. *Id.*
Addressing the rationale for requiring a protective order pending appeal in landlord-tenant disputes, the court noted that, unlike a pretrial order, an order requiring the posting of security pending appeal is not unusual.\(^5\) Furthermore, equity requires that the court carefully consider the parties' positions and avoid placing either at a disadvantage during further litigation.\(^5\) As in \textit{Bell}, the court noted that the tenant is only being asked to fulfill an obligation that he voluntarily assumed by entering into a lease.\(^5\) However, as with pretrial protective orders, the court did not intend to make protective orders automatically available in the appellate process.\(^6\) The court emphasized that the landlord must still show a need for such an order at the appellate stage.\(^6\)

The court next established the appropriate procedure for issuing a protective order in the appellate stage of a landlord-tenant dispute. It held that the \textit{Bell} standards must be complied with before an order can be issued.\(^6\) In addition, the amount to be deposited monthly pursuant to the protective order must be related to the findings of the trial court.\(^6\) Thus, where housing code violations have been found, the rent must be abated in accordance with these findings.

\textbf{C. Hearing Requirement for Protective Orders}

In both \textit{Bell} and \textit{Cooks}, the court of appeals required a motion, notice, and an evidentiary hearing prior to issuing a protective order in a land-

---

\(^{5}\) Cooks v. Fowler, 459 F.2d 1269, 1271-73 (D.C. Cir. 1971). The most frequently used security device pending appeal is the supersedeas bond. In the District of Columbia, the party appealing from the judgment is required to post a bond to stay execution of the judgment pending appeal. See Super. Ct. R. Civ. 62(d); D.C. Ct. App. R. 7.

\(^{6}\) 459 F.2d at 1273. The court noted that the equitable balancing may "eventuate in a stay of eviction for the tenant and a protective order for the landlord." \textit{Id.} at 1273 n.27.
lord-tenant dispute. In *McNeal v. Habib*, the court addressed the issue of whether a landlord's oral motion for a protective order entered at trial with both parties present satisfied these procedural requirements. Additionally, the court determined whether disbursement of funds without a hearing satisfies the *Bell* requirement that the disposition be made by the court at the conclusion of the trial, following a presentation of evidence by both parties.

In *McNeal*, the landlord made an oral motion for a protective order requiring the tenant to pay the monthly rent into the court registry when the tenant asserted a *Javins* defense to his suit for repossession of the rental property. After oral argument, the motion was granted, and the tenant complied with the order by depositing one month's rent into the court registry. The tenant surrendered possession of the premises before the trial date, however, and sought to have the money that he had deposited in the court registry returned. The trial judge nevertheless released the money to the landlord without a hearing.

On appeal, the District of Columbia Court of Appeals upheld the protective order but reversed the lower court's disbursement of the escrow account. The court recognized that the landlord is unaware of any need to seek a protective order until the original trial date, since it is at that point that the tenant asserts a defense or requests a jury trial. Where both parties are present, the *Bell* procedural requirements are satisfied, provided the tenant is given an adequate opportunity to present evidence of any housing code violations that may abate the amount to be deposited.


65. *Id.* at 510-11.

66. *Id.* See supra note 50 and accompanying text.

67. 346 A.2d at 510.

68. *Id.* The tenant argued that *Bell* had held that, when a tenant abandons the premises prior to trial, he is entitled to any money that he had deposited in the court registry pursuant to a protective order, unless the landlord promptly seeks a money judgment. In the alternative, the tenant sought a hearing on abatement under *Javins*. *Id.* at 510-11.

69. *Id.* at 511.

70. *Id.* Of the approximately 120,000 cases handled annually by the Landlord and Tenant Branch of the District of Columbia Superior Court by 1975, few actually went to trial. Most cases were concluded on the trial date by dismissal, default, or judgment by confession. *Id.* See also Gerwin, *A Study of the Evolution and Potential of Landlord-Tenant Law and Judicial Dispute Settlement Mechanisms in the District of Columbia—Part II: A Critical Examination and Proposal for Reform*, 26 CATH. U.L. REV. 641, 657-58 (1977). But see supra note 45. (Thousands of protective orders are entered annually in the District of Columbia.)
monthly in the court registry pursuant to a protective order. However, the court held that in the absence of an agreement by the parties, when a tenant has alleged that housing code violations exist, a hearing must be held to determine if the tenant is entitled to a set-off on his rent. That hearing requirement may be satisfied within the context of the trial, but where, as in McNeal, no trial ensues, a hearing for disbursement of funds must be scheduled.

In Armwood v. Rental Associates, Inc., the District of Columbia Court of Appeals underscored the necessity of an evidentiary hearing prior to disbursement of an escrow fund established pursuant to a protective order in a landlord-tenant controversy. In this case, the trial judge, without holding an evidentiary hearing, released the funds the tenant had deposited in the court registry after a settlement agreement between the landlord and the tenant had lapsed. Consequently, the tenant was prevented from offering evidence as to the reasonable rental value of the premises prior to their repair by the landlord.

On appeal, the decision of the trial court was reversed. Relying on Javins and McNeal, the court of appeals affirmed the tenant's right to present evidence as to abatement of rent based on the condition of the premises during the period when the protective order was in effect. Thus, the court remanded the case for a hearing to determine the reasonable rental value of the apartment during the time the repairs were incomplete.

72. Id. at 515 n.16. The court stated that "if opposing counsel formally agree on the disbursement of the money, we see no need for a judicial order to obtain a release of the escrowed funds." Id.
73. Id. at 514. The court in McNeal indicated that the Bell court's suggestion to return deposited funds to the tenant if the tenant abandons the premises prior to trial was dicta, in the nature of an advisory opinion, and need not be followed as precedent since that issue was not present in Bell. Id. at 514 n.15. The court in McNeal decided that since both "parties and the money already are before the court, it would be pointless to call for instituting a new proceeding as a means of concluding the existing one." Id.
74. Id. at 514. D.C. CODE ANN. § 45-1402 (1981) provides that "[a] tenancy from month to month, or from quarter to quarter, may be terminated by a 30 days notice in writing from the landlord to the tenant to quit . . . ." Since housing code violations are not relevant to the statutory notice to quit, the court is to determine if an abated rent is appropriate only for the time the tenant was in possession beyond the notice period. In arriving at its determination, the court should also consider the effect of the tenant's continued occupancy on the landlord's ability to put his property to productive use. Id.
76. Id. at 191.
77. Id.
78. Id. at 190.
79. Id. at 191.
80. Id.
III. RELEASE OF ESCROWED FUNDS TO THE LANDLORD DURING THE LITIGATION

In addition to holding steadfastly to the requirement of a hearing before funds in a tenant's escrow account may be disbursed, the court of appeals has been just as adamant in its insistence that no funds be disbursed until the lawsuit is concluded. As well as filing a motion for a protective order, the elderly landlord in *Cooks* also filed a motion to require the tenant to pay the monthly rent directly to her, rather than depositing it in the court registry.81 The court denied the request, stating that the landlord had failed to demonstrate a compelling need for the release of the funds.82 It noted that the tenant risks irreparable injury if, following a release of funds in escrow during the lawsuit, the landlord becomes insolvent and is unable to return to the tenant the abatement determined by the court.83

On appeal, the United States Court of Appeals for the District of Columbia recommended a very cautious approach to any request for a release of funds during litigation. In dicta, the court recognized that extraordinary circumstances might justify releasing some portion of the funds in the court registry.84 However, it stated that only that part of the funds over which there is no dispute and to which the landlord will necessarily be entitled at the end of the litigation should be released.85 The court further required that any claim by the tenant that he is not liable for the full rental amount for the premises must be honored so long as the claim is not frivolous,86 thereby suggesting that the tenant must concede that a particular portion of the rent is presently due and will continue to be due to the landlord.

Finally, the court specified that a landlord's claim to a portion of the money deposited in the court registry must receive the most careful scrutiny by the trial court at a hearing of which the tenant has received notice.87 The landlord must then "demonstrate convincingly so dire a

---

81. *Cooks* v. Fowler, 437 F.2d at 676 n.39.
82. *Id*.
83. *Id.* The court indicated that "[t]he landlord's protective order, like the injunction, is 'an equitable remedy,' (citation omitted) and is similarly circumscribed." *Id.* In determining whether an injunction should issue, the court must be convinced "that the normal legal avenues are inadequate, that there is a compelling need to give the plaintiff the relief he seeks, and that the injunction will not wreak greater harm on the party enjoined." *Dorfmann v. Boozer*, 414 F.2d at 1174. These criteria thus apply to the issuance of an order releasing funds in escrow during litigation. 437 F.2d at 676 n.39.
84. *Cooks* v. Fowler, 459 F.2d at 1277. The court maintained that its "basic responsibility to do equity between the parties leaves a small, sharply circumscribed area in which a turnover of some part of the fund might be vindicated." *Id.*
85. *Id.* at 1277.
86. *Id*.
87. *Id.*
need88 for interim relief that the court is persuaded to grant it. This language strongly indicates that the landlord must show a much greater need to obtain a release of escrow funds during litigation than is necessary to obtain the initial protective order.

IV. THE DAMERON SOLUTION—SUBSTANCE OVER FORM

Through its decision in Dameron, the court of appeals raised doubts as to its continued commitment to preserving the entire fund in the court registry until the conclusion of a landlord-tenant suit. The dispute in Dameron arose when the District of Columbia Rental Accommodations Office authorized a rent increase in December that was to take effect the following February.89 The tenants petitioned the Rent Administrator for a review of the increase but were notified that the increase would become effective immediately and would not be stayed pending review.90

To protest the increase, approximately half of the tenants in the apartment tendered their February and March rent at the original rate.91 Capitol House Associates sued for possession of those tenants’ units based on their nonpayment of rent.92 The tenants requested a jury trial, and immediately, Capitol House Associates filed a motion for a protective order that would require the tenants to pay the full monthly rent into the court registry during the litigation and the court to release the original rental amount to them monthly.93

At the hearing on the landlord’s motion, the tenants indicated that they intended to raise housing code violations as a defense and sought preserva-

88. In Cooks, the court stated that the imposition of any equitable remedy should prevent either party from being placed in a position of disadvantage during the litigation. 459 F.2d at 1273. In addition, the court relied heavily on the Bell rationale. One of the concerns of the Bell court was not to unbalance tactics in favor of landlords. 430 F.2d at 480-81. See supra note 37.

89. 431 A.2d at 581-82. In addition to the 20% increase to take effect in February, a further 10% increase was authorized from July 1. Brief for Appellee at 1, Dameron, 431 A.2d 580 (D.C. 1981).


91. Dameron, 431 A.2d at 582.

92. Id.

93. Id.
tion of the entire fund in the court registry. They alleged that housing code violations existed in the apartment building, and that the entire fund formed part of the dispute since they were contesting the validity of the rent increase. They further claimed that, under *Cooks*, they were entitled to a full hearing to determine the landlord's right to the funds before the conclusion of the suit.

In seeking the release of a substantial portion of the escrow funds, the landlord argued that the court was obligated to balance his need for securing money for mortgage payments and operating expenses against the tenants' interest in maintaining control over the funds. He further maintained that a release was proper without a full hearing so long as the tenants eventually have an opportunity to present their abatement claims.

District of Columbia Superior Court Judge Frederick Weisberg rejected the tenants' arguments and granted the protective order. The District of Columbia Court of Appeals subsequently affirmed the decision of the trial court.

On appeal, the tenants challenged the release of the funds to the landlord during litigation. The court of appeals, however, raised the issue of the appealability of pretrial protective orders *sua sponte*. The court noted that a pretrial protective order is not final, since it may be revised at any point during the suit. Accordingly, the court held that it was not appealable under the laws of the District of Columbia.

Next, the court examined the exceptions to the final judgment rule in order to determine if the pretrial order was appealable. It held that the protective order was not subject to review under either the collateral order

---

94. *Id.*
95. Brief for Appellants at 4, 6, *Dameron*, 431 A.2d 580 (D.C. 1981). If the rent increase was invalidated, abatement for housing code violations would be due from the original rent since the entire amount of increase would be returned to the tenants.
96. *Id.* at 6, 7, *Dameron*, 431 A.2d at 582.
97. Brief for Appellee at 7, *Dameron*, 431 A.2d 580 (D.C. 1981). The rent Capitol House Associates had received, however, had left it unable to cover the building's expenses for years. *Id.* at 14. This brings into question the *Cooks* requirement of a showing of potential solvency at the conclusion of the litigation as well as dire need.
99. *Dameron*, 431 A.2d at 582.
100. *Id.* at 584.
101. *Id.* at 582.
102. *Id.* at 585. In *Blanks v. Fowler*, 459 F.2d 1282 (D.C. Cir. 1971), the court stated that "protective orders are subject to reopening and revision for good cause at any time." *Id.* at 1284 n.13.
doctrines or the interlocutory exception. The collateral order doctrine allows review of procedural matters not directly related to the substance of the dispute, especially where they may foreclose a party's access to the court. In Dameron, the validity of protective orders was not disputed; only the amount to be deposited in the court registry pursuant to the protective order was in controversy. Judicial practice vests the determination of this amount in the sound discretion of the trial court, and the tenants in Dameron were not foreclosed from access to the courts by imposition of the protective order. Therefore, the order was not appealable as a collateral order. Discussing the statutory interlocutory order exception, the court stated that, for an order to be appealable under this statute, it must affect real property and alter the status quo between the parties. Since the order in Dameron affects money and does not alter the status quo, it is not appealable.

In determining the propriety of this protective order, the court of appeals reviewed the purposes served by protective orders. It noted that the significant factor in this dispute was a rent increase. The court stated that the housing code violations demonstrated at the hearing during which the protective order was entered were de minimis, and thus concluded that a protective order with a provision for release of funds to the landlord during litigation sufficiently protected both parties' interests. According to the court, to refuse to release funds in this case would permit the protective order to become an "economic weapon of unreasonable

---

104. Dameron, 431 A.2d at 586-87. Appeal from a pretrial protective order may still be possible, however, where both gross abuse of discretion and irreparable injury can be shown. Id. at 584 n.6.

105. Id. at 586-87. The collateral order doctrine was enunciated by the Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). This doctrine allows appeal from an order that is final and unrelated to the merits but may result in irreparable injury if not appealed immediately.

106. 431 A.2d at 586-87.

107. Id. at 586. But see Cooks v. Fowler, 437 F.2d at 672 n.7. The court stated that "[w]ith some regularity we have considered pretrial protective orders appealable... and we perceive no basis for distinguishing protective orders framed with a view to a prospective appeal. Both types seem to fall within the collateral order doctrine articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)." Id.


109. Dameron, 431 A.2d at 587.

110. Id.

111. Id. at 584. The court noted that protective orders preserve rent, provide a source of abatement, and assure that the tenant is asserting his defense in good faith. Id.

112. Id.
proportion."

Considering the tenants' request for an evidentiary hearing, the court asserted that a full hearing on a release of a portion of the funds held in the court registry is inappropriate at the pretrial stage because the order does not affect any permanent property rights of the parties. It further noted that a full hearing has the potential of denying the parties the right to a jury trial by preempting the dispute. Finally, the court stated that a protective order should be designed to preserve the status quo, and this was precisely the effect of the protective order in Dameron.

V. Dameron: Turnover or Turnabout?

Until its decision in Dameron, the court of appeals had been extremely wary of sanctioning any arrangement that would result in a release of funds deposited by tenants in the court registry during the litigation of a landlord-tenant controversy. In Cooks, the court required a landlord to demonstrate both severe need and financial solvency when seeking a release of funds during litigation. It is doubtful that the landlord in Dameron met these apparently incompatible burdens. In Cooks, the landlord's inability to meet expenses for several years while receiving rent for the building suggests at least questionable financial solvency. Furthermore, in Cooks, while the landlord's operating deficit and personal financial needs were sufficient to show a need for a protective order, they were not sufficient to meet the burden required for a release of funds during the lawsuit. In Cooks, the court required that the landlord show an uncontested right to a portion of the fund when seeking its release. In Dameron, it was sufficient for the landlord to show that a portion of the

113. Id. at 585.
114. Id. at 584.
115. Id. at 587. The court observed that "[t]he protective order in this instance has preserved exactly the status existing prior to the controversy between the parties." Id. Prior to the inception of a landlord-tenant controversy, however, the tenant is in possession of the rental unit and paying the agreed-upon rent.
116. See supra notes 84-88 and accompanying text.
117. Cooks v. Fowler, 459 F.2d at 1277.
118. See supra note 97.
119. Cooks v. Fowler, 437 F.2d at 674 n.25.
120. Cooks v. Fowler, 459 F.2d at 1277. In Cooks, the court determined: "Where, but only where, the court can say with complete certainty that the landlord will become entitled to a definite part of the in-court fund in any event, and the landlord demonstrates convincingly so dire a need for that part as to persuade the court to exercise its equitable powers to afford him some relief, the court may, to just that extent, respond favorably to the landlord's request for disbursement from the deposited fund pendente lite." Id.
The landlord's situation in *Dameron* is analogous to the landlord's situation in *Cooks*, yet the court reached a radically different result. One notable difference between *Cooks* and *Dameron*, and perhaps the basis of the *Dameron* decision, may be the extent of the housing code violations. The *de minimis* showing of housing code violations and the character of the apartment complex in *Dameron* may have prompted the court to permit a release of funds, in spite of the landlord's failure to satisfy the *Cooks* criteria.

The court of appeals emphasized in *Dameron* that the amount retained in the court registry is subject to the discretion of the trial judge and will vary on a case-by-case basis. Rent withholding, however, is considered by the court to be a tactic available to tenants. Apparently, the trial court will use its discretion to determine the reasonableness of that tactic in each case. Thus, courts sympathetic to the plight of the landlord in today's economic situation may authorize a turnover of funds in questionable cases, further weakening the tenants' position in landlord-tenant disputes.

In addition, it is conceivable that in the majority of landlord-tenant disputes where the tenants withhold rent, the landlord will be entitled to some rent for the premises. Under the reasoning of *Dameron*, the landlord should be able to receive whatever amount the tenant is unable to demonstrate should be retained in escrow. Even requiring the landlord to make some showing of need should present no obstacle to the release of some portion of the funds, since it is unlikely that a landlord will not need any rental income from his premises.

While tenants in the District of Columbia most often withhold rent to seek improvements in housing conditions, tenants in other jurisdictions have used this tactic to force a landlord to sell the premises for rehabilitation, to protest rent increases, to force the resignation of city commission-

---

121. *But see supra* note 95 and accompanying text.
122. The trial judge in *Dameron* noted that the building "could fairly be characterized as a middle or upper-middle income apartment house . . . and that the conditions in the building were not typical of inner city low income developments or projects." 431 A.2d at 582.
123. The *Dameron* court stated: "The protective order is an equitable tool of the court requiring the exercise of sound discretion on a case-by-case basis." 431 A.2d at 583. Continuing, the court declared: "The amount necessary to provide this protection may vary depending on the weight given by the court to appropriate factors." *Id.* at 584. Finally, the court stated that "*[t]he true issue is the question of its amount, the determination of which is vested in the sound discretion of the court.*" *Id.* at 586.
124. The court has given tacit approval to rent withholding in both the *Bell* and *Dameron* decisions. In *Dameron*, the court stated that "*[w]e see no just cause for allowing the protective order to become an economic weapon of unreasonable proportion . . . ." *Id.* at 585. *See supra* note 37 and accompanying text.
ers, and to secure changes in the welfare system.\textsuperscript{125} Even if the decision in \textit{Dameron} is limited to situations where tenants protest a rent increase while rent control is in effect, there is no guarantee that rent control will not eventually be repealed.\textsuperscript{126} Rent withholding, as a tenant bargaining tool, is thereby limited to disputes over housing code violations. The tenants' bargaining power and most effective tactic is sharply undermined by release of funds to the landlord during litigation.

In the final analysis, while the landlord must continue to submit a motion for a protective order whenever tenants withhold rent, the burden for maintaining any particular amount of rent in the court registry rather than releasing a portion to the landlord may be placed on the tenant. At the hearing on the landlord's motion for a protective order, the tenant must demonstrate that housing code violations are of sufficient magnitude to justify retaining the entire rent in escrow, at least where a rent increase formed the basis of the dispute.

\section*{VI. Conclusion}

In \textit{Dameron}, the court of appeals held that release to a landlord of funds deposited in the court registry by tenants pursuant to a protective order is valid without a full hearing where a rent increase is in dispute and housing code violations are \textit{de minimis}. This decision potentially undermines the

\textsuperscript{125} \textit{Organization for Social and Technical Innovation}, in \textit{Housing in America} 501-07 (D. Mandelker & R. Montgomery ed. 1973). The author remarked that "[w]hile improved housing conditions are almost always a major objective of rent strikes, many groups have withheld rent for other purposes. The South End Tenants' Council in Boston held a rent strike to force a landlord to sell his properties for rehabilitation. Public housing tenants withheld rent in St. Louis to protest rent increases, and in Muskegon Heights, Michigan, to force the commissioners to resign. Welfare recipients in New York City talked about a rent strike to force major changes in the welfare system, although they also wanted major housing improvements." \textit{Id.} at 501 (emphasis in original).

\textsuperscript{126} \textit{See generally} Note, \textit{The District of Columbia Rental Housing Act of 1977: The Effect of Rent Control on the Rental Housing Market}, 27 CATH. U.L. REV. 607 (1978). It is also interesting to note that the Rental Accommodations Act of 1975, repealed nine months before the rent increase in \textit{Dameron}, provided for just such an arrangement as Capitol House Associates sought. If tenants petitioned the Rent Administrator for review of the increase within 30 days notice of the increase, the landlord was to make monthly deposits of that increase into an interest bearing account. The Rent Administrator determined the ultimate equitable distribution of the money so deposited. D.C. \textsc{Code Ann.} § 45-1644(h)(2) (Supp. VI 1977). This provision was strongly recommended by the Council of the District of Columbia. The Council members believed it imperative that landlords receive rents due during a dispute over a rent increase. \textit{Hearing and Disposition Before the Subcomm. on Commerce, Housing, and Transportation of the Comm. on the District of Columbia: First Session on H. Con. Res. 399 to Disapprove the District of Columbia Rental Accommodations Act of 1975, reprinted in 1 COMM. ON THE DISTRICT OF COLUMBIA MISCELLANEOUS HEARINGS, 94TH CONG., 1ST SESS. 47 (1975).}
effectiveness of rent withholding. Tenants in the District of Columbia may find themselves in the disadvantaged position of having their most effective tactic neutralized in an increasingly tight rental market. The decision should not, however, effect the tenants' right to have the entire fund preserved where they demonstrate major housing code violations.

Whether this potential is developed to the detriment of tenants remains to be seen. Unquestionably, landlords will be testing the inclinations of the trial courts. Ultimately, it is these courts that will determine the strength of rent withholding as a tenant tactic in the District of Columbia, whenever major housing code violations do not form the main focus of the dispute.

Susan E. Patrick

---

127. A report prepared by the District of Columbia Department of Housing and Community Development indicates that an increased demand for rental housing, slow construction rates, low turnover of rental units, and the high number of condominium and cooperative conversions have resulted in intense competition for the same housing among all income groups. In addition, in 1979, 43,521 rental units were determined to require improvements at an estimated average cost of $10,000 each. D.C. Dept' of Housing and Community Development, Housing Problems, Conditions & Trends in the District of Columbia (June 1979) (prepared for Mayor Marion S. Barry, Jr.). See generally Comment, From Urban Decay to New Construction and Rehabilitation: Housing in the District of Columbia, 27 CATH. U.L. REV. 579 (1978).