ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

3075 SSA HB 1 (FILE 1) - (FILE 2) 8672

Offered: 3/16/83
Referred: Rules

Original sponsor: Abood

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to landlords and tenants."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.45 is amended by adding a new paragraph to read:

Sec. 09.45.085. ENFORCEMENT. A judgment for the restitution of real property rendered in an action for forcible entry or detention may be enforced by the plaintiff without further judicial action and the plaintiff may not be required to obtain a writ of assistance or other order to enforce the judgment.

* Sec. 2. AS 09.45.090 is amended by adding a new paragraph to read:

(4) when, after a notice to terminate the tenancy as provided in AS 34.03.290 with reference to termination of a periodic tenancy, a person continues in possession of a dwelling unit after expiration of the time for determining the tenancy.

* Sec. 3. AS 34.03.270 is amended by adding a new subsection to read:

(b) If the rental agreement is terminated by the tenant, the tenant fails to provide the notice required under AS 34.03.290(a) or (b), and the failure to provide the notice is wilful or not in good faith the landlord may recover an amount not to exceed one and one-half times the actual damages. Failure by the tenant to provide the notice required under AS 34.03.290(a) or (b) is presumed to be wilful and not in good faith.

* Sec. 4. AS 34.03.290(b) is amended to read:

(b) The landlord or the tenant may terminate a month to month tenancy by a written notice given to the other at least 30 days before

the termination [RENTAL DUE] date specified in the notice.

* Sec. 5. AS 34.03.290(c) is amended to read:

(c) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or after its termination, the landlord may bring an action for possession and recovery of actual damages. If [IF] the tenant's holdover is wilful or [AND] not in good faith the landlord, in addition, may recover an amount not to exceed one and one-half times the actual damages. If the landlord consents to the tenant's continued occupancy, AS 34.03.-020 applies.

* Sec. 6. AS 34.03.310(a) is amended to read:

(a) Except as provided in (c) and (d) of this section, a landlord may not retaliate by increasing rent, [OR] decreasing services, terminating the rental agreement or providing notice of termination, or by bringing or threatening to bring an action for possession after the tenant has

(1) complained to the landlord of a violation of AS 34.03.-100;

(2) endeavored to enforce [AVAIL HIMSELF OF] rights and remedies granted to a tenant [HIM] under the provisions of this chapter;

(3) organized or become a member of a tenant's union or similar organization; or

(4) complained to a governmental agency responsible for enforcement of governmental housing, wage, price or rent controls.

* Sec. 7. AS 34.03.310 is amended by adding a new subsection to read:

(f) A landlord is presumed to have violated (a) of this section if the landlord increases rent, decreases service, terminates the rental agreement or provides notice of termination, or brings or

threatens to bring an action for possession within 60 days after a tenant has engaged in an action listed under (a)(1) - (4).

Offered: 3/16/83
Referred: Rules

apply to tenancies of 4 or more units

Original sponsor: Abood

IN THE HOUSE ~~BY THE JUDICIARY COMMITTEE~~

SENATE CS for CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to landlords and tenants."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.45 is amended by adding a new paragraph to read:

Sec. 09.45.085. ENFORCEMENT. A judgment for the restitution of real property rendered in an action for forcible entry or detention may be enforced by the plaintiff without further judicial action and the plaintiff may not be required to obtain a writ of assistance or other order to enforce the judgment.

(after line 13, insert)

* Sec. 2. AS 34.03 is amended by adding a new section to read:

Sec. 34.03.015. PROHIBITED PRACTICES. A landlord or other person having the right to lease or rent real property may not refuse to execute a rental agreement or may not terminate a rental agreement to lease or rent the real property to a person solely because of sex, marital status, changes in marital status, pregnancy, parenthood, race, religion, color or national origin.

(b) If the rental agreement is terminated by the tenant, the tenant fails to provide the notice required under AS 34.03.290(a) or (b), and the failure to provide the notice is wilful or not in good faith the landlord may recover an amount not to exceed one and one-half times the actual damages. Failure by the tenant to provide the notice required under AS 34.03.290(a) or (b) is presumed to be wilful and not in good faith.

* Sec. 4. AS 34.03.290(b) is amended to read:

(b) The landlord or the tenant may terminate a month to month tenancy by a written notice given to the other at least 30 days before

the termination [RENTAL DUE] date specified in the notice.

* Sec. 5.4 AS 34.03.290(c) is amended to read:

(c) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or after its termination, the landlord may bring an action for possession and recovery of actual damages. If [IF] the tenant's holdover is wilful or [AND] not in good faith the landlord, in addition, may recover an amount not to exceed one and one-half times the actual damages. If the landlord consents to the tenant's continued occupancy, AS 34.03.-020 applies.

* Sec. 6. AS 34.03.310(a) is amended to read:

(a) Except as provided in (c) and (d) of this section, a landlord may not retaliate by increasing rent, [OR] decreasing services, terminating the rental agreement or providing notice of termination, or by bringing or threatening to bring an action for possession after the tenant has

(1) complained to the landlord of a violation of AS 34.03.-100;

(2) endeavored to enforce [AVAIL HIMSELF OF] rights and remedies granted to a tenant [HIM] under the provisions of this chapter;

(3) organized or become a member of a tenant's union or similar organization; or

(4) complained to a governmental agency responsible for enforcement of governmental housing, wage, price or rent controls.

* Sec. 7. AS 34.03.310 is amended by adding a new subsection to read:

(f) A landlord is presumed to have violated (a) of this section if the landlord increases rent, decreases service, terminates the rental agreement or provides notice of termination, or brings or

threatens to bring an action for possession within 60 days after a tenant has engaged in an action listed under (a)(1) - (4).

AS 09.45.090.—Actual force is a term well understood, and so is not defined by statute; but constructive force is defined by AS 09.45.090, and that only is constructive force which that section declares to be such. Miners' & Merchants' Bank v. Brice, 5 Alaska 418 ('915).

Actual possession must be shown.—Since forcible entry and detainer is an action purely for possession, and not to try title (AS 22.15.050), such an action cannot be maintained without showing actual possession. Wills v. Peterson, 5 Alas. L.J. No. 12, p. 266 (Dec., 1967).

Possession of tenant does not make such tenant an agent or employee of his landlord. Wills v. Peterson, 5 Alas. L.J. No. 12, p. 266 (Dec., 1967).

... with right of way, 47 ALR 556.

Criminal offense of forcible detainer where entry was peaceable, 69 ALR 957.

Forcible entry and detainer as a remedy of tenant against stranger wrongfully interfering with his possession, 12 ALR2d 1199.

Right of landowner who has conveyed property to third person to maintain forcible detainer or similar summary possessory action, 47 ALR2d 1170.

Sec. 09.45.080. Undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint or any part of it, no appeal may be taken by the defendant from the judgment until he gives, in addition to an undertaking required upon appeal, an undertaking to the adverse party with two sureties. The sureties shall justify, in the manner as bail upon arrest, for the payment to the plaintiff of twice the rental value of the real property of which restitution shall be adjudged from the rendition of the judgment until final judgment in the action, if the judgment is affirmed upon appeal. (§ 17.03 ch 101 SLA 1962)

Sec. 09.45.090. Unlawful holding by force. The following are cases of unlawful holding by force within the meaning of §§ 60—160 of this chapter:

(1) when the tenant or person in possession of a premises fails or refuses to pay the rent due on the lease or agreement under which he holds, or deliver up the possession of the premises for 10 days after demand made in writing for the possession;

(2) when, after a notice to quit as provided in §§ 60—160 of this chapter, a person continues in the possession of the premises at the expiration of the time limited in the lease or agreement under which that person holds, or contrary to a condition or covenant in the lease or agreement, or without a written lease or agreement;

(3) when, after a notice to terminate the tenancy as provided in this title with reference to termination of estate at will or by sufferance, a person continues in possession of the premises after expiration of the time for determining the tenancy. (§ 17.04 ch 101 SLA 1962)

Section defines detainer article is designed to prevent.—This section of the forcible entry and detainer act suggests the character of the detainer which the statute was intended to prevent. Steil v. Dessmore, 3 Alaska 392 (1907).

LAW OFFICES OF

ALASKA LEGAL SERVICES CORPORATION

615 "H" STREET, SUITE 100

ANCHORAGE, ALASKA 99501

TELEPHONE (907) 272-9431

September 30, 1983

Senator Vic Fischer
Chairman, Senate Committee on State Affairs
1024 West Sixth Avenue, Suite 204C
Anchorage, Alaska 99501

Re: Rental housing needs

Dear Senator Fischer:

Recently I returned from an extended vacation to find your July 19th request for information concerning Alaska's rental situation and specifically HB 1. Thank you for the opportunity to comment on both.

Taking HB 1 first, I have the following section by section observations:

Section 1

The proposed AS 09.45.085 would permit landlords to try to forcibly evict tenants after they have obtained a judgment for possession without seeking the assistance of the police. It is a terrible idea.

Under present law, landlords must not only obtain a court order, but also obtain a writ of assistance to be served by the Alaska State Troopers if the tenant does not peaceably vacate as the court has directed. This means that in those situations where physical confrontation is most likely, an Alaska State Trooper is already on the scene. The proposed delegation of authority to landlords creates a situaton similar to a forcible entry, which is a crime in many states. A forcible entry occurs where the landlord, without resort to legal process, attempts to remove the tenant from possession. The necessity of first obtaining a court order under the proposed amendment addresses some of the policy considerations against permitting forcible entries, but not the concern with public safety at the root of the concept that the state, not private citizens, should evict people.

Delegating responsibility for enforcement of court orders to private citizens raises several interesting questions. By doing so, does the legislature intend to grant landlords the privilege of using reasonable force in executing eviction orders? How much force is reasonable? If the landlord uses excessive force, is the privilege of using reasonable force lost? If excessive force is used, is the tenant privileged to respond with force reasonable in the situation as a matter of self defense? What are the rights and potential liabilities of third parties who witness an altercation and intervene on one side or the other? What if the landlord jumps the gun, and tries to oust the tenant after obtaining an order but before the deadline for vacating expires?

Private enforcement of eviction orders is a bad idea. It implies that the legislature approves of the use of intimidation or force on the part of one private citizen against another. The proposed amendment contains no requirement that attempts at private enforcement occur at a reasonable time. The question of a landlord's liability for the property of a tenant removed from the premises is not addressed. The question of whether unannounced lock-outs are a permissible means of enforcement is not addressed, nor is the issue of whether locking a tenants property into the apartment constitutes an illegal distraint for rent under AS 34.03.250.

Not only would the proposed legislation encourage abuses against tenants, it may also make it more difficult for landlords to obtain police assistance with evictions, since present procedures concerning writs of assistance may be abolished. Finally, adoption of the proposed amendment would only encourage litigation to determine the scope of the landlord's privilege and remedy abuses. For reasons of public safety, personal dignity and administrative convenience the proposed amendment should be rejected.

Section 2

This section seems to be intended for purposes of clarification. It makes no substantive change in the law, since landlords may already bring a forcible entry and detainer action upon the expiration of a periodic tenancy. I am not sure what is meant by the last three words "determining the tenancy". Perhaps "determining" is meant to be "terminating".

Section 3

This section imposes punitive damages on the tenant for wilfully or in bad faith failing to give timely notice to the landlord of his or her intention to terminate the tenancy. It also establishes a presumption that failure to give such notice is wilful and not in good faith.

Creation of a presumption that failure to give timely notice is wilful and in bad faith is simply not warranted. Most people tend to regard housing as a personal necessity rather than a business matter, and landlords and tenants alike are frequently ignorant of specific legal requirements, particularly when notices must be given to be effective. Creation of such presumption could put tenants in the position of having punitive damages awarded against them without the issue of wilfulness or bad faith ever explicitly having been raised. Landlords would neither have to plead or prove either issue, but tenants could suffer punitive damages simply by neglecting through ignorance to raise the issue.

As to the imposition of punitive damages itself, no corresponding penalties are imposed upon a landlord for giving untimely notice or for trying to enforce an untimely notice. Imposing such a penalty on tenants thus seems a bit one-sided. A better idea would be to follow the example of AS 34.03.300 (regarding abuse of access) and impose the same liability on landlords and tenants for similar violations.

Imposing punitive damages for failing to give timely notice upon either landlords or tenants make little sense. Present law already imposes liability for compensatory damages. The drafters of the Uniform Residential Landlord and Tenant Act (1972) from which Alaska's URLTA was adopted, saw no need for punitive damages in this situation, and the need probably does not exist.

Section 4

I am opposed to adoption of this section because it would be a significant change in the amount of time necessary to terminate a tenancy without cause. Under present law, the landlord must give the tenant one full rental period's notice be-

fore terminating the tenancy or raising the rent. As most Anchorage rental agreements are month to month tenancies, as a practical matter this generally means thirty (30) days notice for the tenant. The significance of the proposed change is that it would permit material changes in the rental agreement, such as termination or a rent increase, to take place in the middle of the rental period.

At common law, when a lease is entered into the tenant obtains a right to possession upon performance of certain conditions for the duration of the leasehold interest. In the absence of breach by the tenant, neither the terms of the lease agreement nor the duration of the possessory interest may be altered, unless the parties have made some agreement to the contrary. Section 4 would change that relationship by permitting material changes during a time for which the tenant had already paid for possession.

Changing that relationship would raise some interesting questions not addressed by the bill. If the landlord increases the rent during the middle of a rental period, when is the increased rent due? If the tenant decides to leave rather than pay the increase, can he or she remain until the date the increase becomes effective? Should tenants pay only a prorated portion of the prior rent to cover the period they intend to stay, and would doing so violate the terms of their lease and give cause for a termination for breach? If the tenant pays the full month's rent and elects to leave, what are the landlord's responsibilities with regard to returning the unused portion of the rent? If cleaning or damage charges are claimed, may the landlord deduct such charges from the unused portion of the rent as well as any damage deposit held? If so, do the provisions of AS 34.03.070 control the itemization of such deductions and the time in which notice must be given? If the landlord gives notice which would terminate the lease in the middle of a rental period, how much money should the tenant pay at the beginning of the month? Again, if the tenant pays the full rental amount, how much time does the landlord have to return the unused portion?

The proposed Section 4 would give legislative approval to what are considered under present law to be breaches of con-

tract, that is, material changes in the rules of the game during a time for which the tenant has already paid for possession. It is not unreasonable to demand of landlords a full rental period's notice before such changes are made. Under present law, there is at least some uniformity in when apartments change hands. With the proposed change, apartment turnover could take place on any day of the month, and tenants could face increased difficulty in finding a new apartment which would be available without interruption. Since the only interest to be protected by the proposed section is a landlord's desire to end a tenancy without cause, the burden such a change would impose on tenants should outweigh the minimal convenience to be gained by landlords. The proposed amendment should be rejected.

Section 5

This section amends present language to permit the landlord to bring an action for recovery of actual damages as well as possession, and lowers the standard for recovering punitive damages. As to the former change, landlords already have the right to sue for actual damages, so such an amendment seems pointless. However, if inclusion of the additional language is intended to permit the landlord to recover damages in a summary forcible entry and detainer proceeding, serious due process problems would arise.

An FED takes place on only two (2) to four (4) days notice. The sole issue to be tried is that of possession. Damages are put off for decision in the course of a normal civil lawsuit. It is difficult enough to prepare for an FED hearing in the limited time available without the necessity of investigating damages claims as well. Frequently, discovery is necessary to ascertain the legitimacy of the amount claimed, and time is needed to evaluate and gather evidence concerning available defenses. Combining the damages and possession issues into one summary proceeding would raise significant questions as to whether the hearing afforded a tenant under such circumstances could be called meaningful.

The second change, reducing the standard for recovery of punitive damages from a "wilful and not in good faith" to a

"wilful or not in good faith" standard is in line with the proposed standard for punitive damages contained in Section 3 of the bill. It is subject to the same arguments. A high standard of proof should be required before punitive damages are imposed. Lowering the standard in this instance to not require bad faith would expose tenants to punitive damages in all instances where they elected to fight an eviction in court, no matter what the merits of their position. By electing to stay, tenants could be said to have "wilfully" held over beyond the termination of the tenancy, and if they lost in court, landlords could request the punitive damages permitted by the proposed amendment. Such a risk may well have a chilling effect upon tenants' willingness to challenge unlawful terminations, even in cases where the eviction is clearly retaliatory. Furthermore, this chilling effect may have a disparate impact upon low income tenants.

A standard which would expose tenants to punitive damages for insisting upon their day in court should not be adopted.

Section 6

This and Section 7 seem to be only tenant oriented provisions in the entire bill. The changes contained in the proposed Section 6 are mainly cosmetic, except for explicitly including termination of the rental agreement or providing notice of termination to the list of retaliatory conduct. Specific inclusion of both is a good idea.

Section 7

The sixty (60) day presumption created by this section would avoid some of the proof problems inherent in raising a claim of retaliatory eviction. Considering that the presumption would only arise in the four (4) situations enumerated in AS 34.03.310(a), the potential for abuse seems minimal. Also, it is reasonable to attach a retaliatory motive to evictions occurring within sixty (60) days of a tenant's engaging in one of the four (4) categories of protected activity, something which cannot be said of the presumption proposed in Section 3 of the bill.

This section is a good idea, but it does not go far enough, particularly considering the punitive damages against tenants recommended in Sections 3 and 5 of the bill. For the sake of consistency and fairness, if landlords re to be awarded punitive damages when the tenant breaches, so should tenants be awarded punitive damages in the event of a landlord's retaliation. Since if the tenant wins a retaliation claim there are likely to be no actual damages beyond attorney's fees, an appropriate statutory amount would be one and one-half (1 1/2) times the monthly rent. Adding teeth to the retaliation statute would also serve the salutary purpose of actively discouraging interference with the exercise of protected rights as opposed to merely preventing such interference when it is brought to the attention of the court.

Other Matters

That concludes my comments regarding HB 1. As far as Alaska's rental situation in general, what I have to say falls more under the heading of ideas than suggestions.

Tenants in Alaska have little security when it comes to rental increases. Rents can usually be raised on only one (1) month's notice, and there is no limit on the amount of the increase. This factor combined with the current shortage of housing in the Anchorage area makes for a very strong sellers market, and this is hurting low income people quite a bit. I would like to see some limits on the use of month to month rental agreements, some restrictions on the availability of evictions without cause in the absence of sale or changes in the use of the property, and some limits on how often and by how much rent can be increased.

I note that AS 34.06.010 - .060, which expired July 1, 1977, used to authorize the governor to declare a state of housing emergency if conditions warrant it. Upon such a declaration, residential rents came under regulatory control. One possibility would be reactivating Title 34 Chapter 6, to make rent control available in housing emergencies. The problem with this or any other course of action raising the specter of rent control is that as soon as the issue arises, rents go

up. I don't know how to get around this problem, but I suspect that one way would be a gradual increase in the rights of tenants, and in particular getting rid of no-cause evictions.

Thank you again for the opportunity to comment. Please do not hesitate to ask again in the future.

Sincerely,

ALASKA LEGAL SERVICES CORPORATION

Joseph D. O'Connell /glh

Joseph D. O'Connell
Attorney at Law

JDO/glh

cc: John

STATE OF ALASKA
FISCAL NOTE

Revision Date March 21, 1983

I. REQUEST

Bill/Resolution No.: CSHB 1 (Judiciary)
Title: Landlords and Tenants
Sponsor: Representative Abood
Requestor: House Finance Committee

II. FISCAL DETAIL

Agency Affected: Dept. of Law
Program Category Affected: Public Protecti
SRU, Program of Subprogram(s) Affected:
Consumer Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		5.0				
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	5.0	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	5.0	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

No information provided.

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: March 21, 1983

Approved by Commissioner: Richard R. Pegues /SR/ Norman C. Gorsuch, Attorney General
Date: March 21. 1983
Department: Department of Law

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)

ANALYSIS
CSHB 1

The committee substitute does not change the department's involvement in landlord/tenant matters where we are only permitted to provide information on landlord and tenant rights.

This bill amends the state's existing statutes setting out the private rights and remedies accorded to both landlords and tenants, and in so doing the bill modifies some of those rights and remedies. Alaska law does not provide for government intervention or enforcement and any remedial action is a private civil matter of either landlord or tenant, or both. AS 44.23.020(b)(8) does provide, however, that the Attorney General shall prepare, publish and revise an information packet on landlord and tenant rights. Enactment of this bill will require the revision of existing landlord/tenant handbook, the costs for which ($5,000) are included in this fiscal note.

Alaska State Legislature

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HOUSE MAJORITY WHIP
CHAIRMAN
STATE AFFAIRS
MEMBER
TRANSPORTATION
LEGISLATIVE COUNCIL

Representative Mitch Abood
HOUSE DISTRICT 11

MEMORANDUM

TO: Senator Vic Fischer
Chairman, Senate State Affairs Committee

FROM: Representative Mitch Abood

RE: Committee Substitute for Sponsor Substitute for House Bill No. 1 (House Judiciary)
"AN ACT RELATING TO LANDLORDS AND TENANTS"

DATE: Synopsis as of April 30, 1983

****

The Alaska Statutes governing Landlords and tenants is not entirely clear in defining certain areas of concern to both the landlord and the tenant. Both the landlord and the tenant hold certain unalienable rights in the property they own as a landlord or rent as a tenant. With the 0% to 4% vacancy rate in most of Alaska, and because over 35% of the population in Alaska rent their dwellings, it is necessary to update the laws to answer the needs of the landlord and tenant. I introduced House Bill No. 1 to answer some of these needs. I feel that it is fair and equitable to both parties.

Section 1: This provision authorizes enforcement of a judgment for the restitution of real property obtained in an action for forcible entry or detention. No other order to enforce the judgment may be required. (This simply means that the landlord does not have to go through an additional step to rightfully acquire his property.)

Referring to Section 2. of CSSSHB 1, the landlord's rights are more clearly defined in relation to termination of a "periodic tenancy" held by a tenant. As the law stands now, it refers only to a lease or agreement, (a predetermined period of time) or an "estate at will", (for which the tenant is at the mercy of the landlord, and has no say in how long the tenancy will last). A "periodic tenancy" refers to a month to month period of time. Unlike a lease or agreement, it can be indefinite, and a good majority of rental arrangements today are based on a periodic tenancy. By inserting this new paragraph, it assists the landlord in enforcing his rights, should any conflicts arise due to termination.

Section 3 of CSSSHB 1 was added by the Labor and Commerce Committee to further clarify AS 34.03.290 (c) relating to the 30 day notice. If thetenant fails to give notice of termination, then the landlord is entitled to an amount not to exceed one and one-half times the actual damages.

Section 4 provides for a 30 day notice. I feel that this is an equitable time frame to both tenants and landlords. Due to the tight rental market in Alaska at the present time, it is quite difficult to find adequate housing, especially for those families with children or pets, not to mention the elderly and minorities. "Rental due date" refers to the date on the same day each month that rent is to be paid. The landlord may wish to give notice of termination to the tenant before the "rental due date", and replacing "rental due date" with the word "termination" date provides for either time frame. It does not restrict either party to the exact date the rent is due when giving a termination notice. The question arises, "What if the tenant gives notice on, say May 17th?" This means that the termination date would be June 16th, (or 30 days). The landlord would not lose any rental income even though the termination date falls after the "rental due date".

Section 5 provides for recovery of "actual damages", as well as one and one-half times the actual damages as compensation to the landlord. This deters the tenant from staying on past termination or the expiration of the rental agreement and in effect, is incentive to the tenant to vacate the premises.

An improper hold-over by a tenant has caused landlords financial difficulties. If a tenant continues to occupy a dwelling after his tenancy expires, he is causing the landlord loss of potential income needed to make mortgage payments, as well as the loss of time to make necessary repairs before renting the unit to the next party. Alaska law allows landlords to sue for damages, but the time, effort and money involved is not always feasible to pursue.

Section 6 adds terminating a rental agreement or providing notice of termination to the list of the actions that a landlord may not take when a tenant attempts to enforce his rights.

Section 7 was included in this bill to protect the tenant from landlords who abuse the right to access or evict the tenant for retaliatory reasons. The tenant has a right to his/her privacy, and the landlord must give "reasonable" notice to the tenant before entering the property. This new subsection also provides that the tenant may not be evicted because they have made a complaint, (for just causes), against the landlord, as long as they abide by the laws governing landlords and tenants. Sixty days is a sufficient amount of time to correct a problem or answer a complaint.

This bill is intented to update the present laws governing both the landlord and tenant. I feel that it provides both parties with fair and equal provisions to answer some of the overwhelming problems that have arisen over the past several years, due to the increase of the Alaskan population.

* *

(It should be noted here that an increase in rents well as substantial or material changes in the existing rental agreement may also constitute a form of termination. This is, in effect, terminating the rental agreement then in existance and offering a new rental agreement at different terms. If the tenant does not accept the "new terms", then he must vacate 30 days after the receipt of notice of changes in the existing rental agreement. If the tenant does not respond to the landlord's notice of changes, then at the end of the 30 day period, the new rental agreement takes effect.)

HB

1

#2

KETAL v. HALIMA 1

SUPREME COURT OF HAWAII—1

Syllabus

WINDWARD PARTNERS, a registered Hawaii partnership, Plaintiff-Appellee, *v.* SARAH DELOS SANTOS, HENRY OSHIRO, MACARIO ADVERSALO, KAZUYOSHI KAMIYAMA, KENNETH Y. KAMIYA, MR. AND MRS. THOMAS P. ADOLPHO, MR. AND MRS. SAMUEL KAKAZU, and EVERETT C. DAVIS, Defendants-Appellants

Check + Compare Adkuli v Trueadale

NO. 6305

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE HAROLD T. SHINTAKU, JUDGE

APRIL 6, 1978

RICHARDSON, C.J., KOBAYASHI, OGATA, MENOR AND KIDWELL, JJ.

LANDLORD AND TENANT — *summary possession — defenses — retaliatory eviction.*

The defense of retaliatory eviction does not rise to a constitutionally protected right.

SAME — *same — same — same.*

Where a tenant asserts a statutory right, in the protection of his property interest as a tenant, and as a result the landlord seeks to dispossess the tenant through summary possession proceedings, the tenant can assert an affirmative defense of retaliatory eviction.

SAME — *same — same — same — landlord's motive — weight and sufficiency of evidence.*

Proof of a landlord's retaliatory motive, by a preponderance of evidence, would support an affirmative defense of retaliatory eviction asserted by the tenants.

SAME — *same — same — same — same.*

Subsequent dissipation of the landlord's illegal purpose and the landlord's legitimate reasons for terminating tenancy is a factual question to be decided by the trier of fact.

SAME — *same — same — same — non-residential tenants.*

There is no reason to deny non-residential tenants the remedy of raising a defense of retaliatory eviction where, as in this instance, the statutory right being exercised pursuant to HRS § 205-4 is equally applicable to non-residential tenants and the exercise of that right by these tenants is likewise to protect their property interests in their tenancies.

SAME — *same — same — same — same.*

Where both residential and non-residential tenants fulfill both elements of the two-prong test, there are no justifiable legal premises to distinguish between the two classes of tenants.

OPINION OF THE COURT BY KOBAYASHI, J.

This is an appeal by defendants-appellants, Sarah Delos Santos, Henry Oshiro, Macario Adversalo, Kazuyoshi Kamiyama, Kenneth Y. Kamiya, Mr. and Mrs. Thomas P. Adolpho, Mr. and Mrs. Samuel Kakazu, and Everett C. Davis (hereinafter referred to as tenants), from a summary judgment order granting plaintiff-appellee, Windward Partners, a Hawaii partnership (appellee), possession of certain rented premises situated at Waikane, in the District of Koolaupoko, Oahu, Hawaii. The trial court held that the tenants' defense of retaliatory eviction was insufficient as a matter of law as a defense in a summary possession proceeding, and that there was no genuine issue as to any material fact on appellee's claim for possession.

We reverse the trial court's judgment and remand for further proceedings in accordance with this opinion.

ISSUES

I. Whether the trial court erred in concluding that retaliatory eviction is insufficient as a matter of law as a defense in a summary possession action.

II. Whether the trial court erred in finding that there was no genuine issue as to a material fact on the issue of the proper period for notice of termination of tenancy.

STATEMENT OF FACTS

The premises in dispute consists of eight parcels of primarily agricultural land situated in Waikane Valley and ranging in size from .172 acres to 15.5 acres. The premises were rented to the tenants by the prior owners of the land, Elizabeth Loy McCandless Marks, Elizabeth Marks Stack, Cynthia Marks Salley, and A. Lester Marks, Jr., tenants in common. Each of the tenants signed a "Short Term Tenancy Agreement" (agreement) with the prior owners. The agreements contained a description of the rented premises, the

tenure and term of the rental, certain covenants and agreements, and a "special clauses" section restricting the use of the premises. Although the agreements differed in certain respects, the covenants and agreements contained in each were essentially the same and each designated the tenancies as "month-to-month." The agreements signed by four of the eight tenants, tenants Delos Santos, Adolpho, Davis and Adversalo, restricted the use of the premises to "residential sites." The agreements signed by tenants Kamiyama, Oshiro, and Kamiya, restricted the use of the premises to "agricultural purposes" or "agricultural or horticultural uses only." The agreement signed by tenant Kakazu restricted the use of the premises to "agricultural purposes" and stated that "no more than one (1) single family dwelling . . . be maintained on said premises." The affidavits filed by the tenants show that four tenants, Delos Santos, Adolpho, Davis and Adversalo, qualify as residential tenants, whereas the remaining four, who are farming but not residing on the property, do not.

Appellee partnership was formed on June 25, 1975,[1] and consisted of twenty-nine to thirty partners. Joseph Rodrigues Pao was designated as executive managing partner, John Felix as managing partner, John Correa as partner-accountant and controller, Allen Hawkins as partner and house counsel, and Michael Scarfone as partner-project coordinator in construction. With the exception of these five members who constituted an "advisory committee" to the rest of the partnership, the other members were in the status of "investors" only. Although approval from the entire membership of partners was required for "major policy decisions", decisions not considered as such were made by Pao and Felix.

Some time in June or early July of 1975, appellee purchased 545 acres of land in Waikane Valley with the intent of

[1] Prior to June 25, 1975, Joseph Pao's discussions and negotiations for purchase of the Waikane Valley land were as the representative of Pao Investment Corporation.

eventually purchasing the entire valley and developing a residential community.[2] In order to implement the development plans, however, the land first had to be redesignated from "agricultural" to "urban", a process requiring an application to and approval from the State Land Use Commission (Commission). A petition was submitted to the Commission requesting redesignation of the Waikane Valley lands, and as required by law, the Commission held a public hearing on the petition prior to its final decision. The tenants, active members and supporters of the Waiahole-Waikane Community Association, publicly and vigorously opposed the redesignation and testified against the petition at the Commission's public hearing. The Commission denied the petition in December, 1974.

Subsequent to the Commission's decision to deny redesignation of the Waikane Valley lands, appellee gave written notice to the tenants, dated August 11, 1975, that their tenancies were terminated effective as of September 30, 1975. The recommendation to evict the tenants was made by Pao to appellee at a general meeting, and it was approved. Partners Pao and Felix gave final approval on the termination.

STATEMENT OF THE CASE

The tenants refused to surrender possession of the premises, and appellee filed eight summary possession complaints in district court. The district court consolidated the eight summary possession complaints upon motion by the tenants and duly transferred the case to circuit court upon the tenants' demand for a jury trial. In answer to the consolidated complaints, the tenants (1) denied that proper notice of termination of tenancy was given by appellee, (2) asserted the defense that the possession proceedings were being initiated

[2] The deposition taken of Pao on March 4, 1976, indicates that Pao's idea for developing Waikane Valley into a residential community began some time in March, 1974. At that time, he began negotiating with Mrs. Marks (Elizabeth Loy McCandless Marks), 50% owner of the Valley, to purchase the land.

in retaliation for the tenants' opposition to the redesignation, (3) asserted the doctrine of emblements. The tenants counterclaimed for damages allegedly caused by appellee's summary possession actions, and by appellee's unfair and unlawful business practices. In an amended complaint, appellee added claims for rent, costs, attorney's fees, and damages to its original complaints, and prayed for writs of possession to issue against the tenants.

On November 18, 1975, appellee moved for summary judgment on its complaints for possession, alleging that the tenants were given notice of termination as was required by law and the terms of the tenancy agreement.[3] The trial court denied the motion when it determined that discovery proceedings were still being conducted, and that there was a dispute as to the proper notice period for termination of tenancy applicable in the case. The trial court also determined that the factual questions underlying the doctrine of emblements prevented the court from setting a date for an eviction order.

At a subsequent hearing on June 1, 1976, appellee orally renewed its motion for summary judgment and the court granted it. The summary judgment order stated in part, the following:

> The Court . . . having found that there is no genuine issue as to any material fact as to Plaintiff's claim for possession, and since retaliatory eviction is insufficient as a matter of law as a defense in a summary possession proceeding, Aluli v. Trusdell, 54 Haw. 417 (1973), the Plaintiff is entitled to summary judgment and the issuance of writs of possession as a matter of law. . . .

The order provided that the tenants were to be permitted to cultivate all growing crops planted on or before June 1, 1975, and to continue such cultivation until such crops were fully harvested. The order dismissed appellee's claims for rent, costs, attorney's fees, and damages and the tenants'

[3] The Short Term Tenancy Agreement specified that either party could terminate the tenancy upon 30 days notice.

counterclaim for damages without prejudice. Tenants moved for a stay of judgment pending an appeal, and the motion was granted.

OPINION

I. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT RETALIATORY EVICTION IS INSUFFICIENT AS A MATTER OF LAW AS A DEFENSE IN A SUMMARY POSSESSION ACTION.

The trial court's conclusion that retaliatory eviction was insufficient as a matter of law as a defense in a summary possession proceeding was premised on the holding in *Aluli v. Trusdell*, 54 Haw. 417, 508 P.2d 1217 (1973). We construe the word "insufficient" as used by the trial court to mean "invalid", and are of the opinion that *Aluli* is not apposite.

In *Aluli v. Trusdell, supra*, the tenant, on a month-to-month tenancy, appealed a district court ruling granting the landlord summary possession of an apartment. The appellant tenant therein contended that his First Amendment rights, made applicable to the states by the due process clause of the Fourteenth Amendment of the United States Constitution and by Article I, section 3 of the Hawaii Constitution, were violated by the appellee-landlord, because the landlord's summary possession proceedings were premised on appellant's action in encouraging his fellow tenants in forming a tenants' association. We held that the landlord's action did not violate appellant-tenant's First Amendment rights: in essence, we held that the defense of retaliatory eviction does not rise to a constitutionally protected right. In retrospect, however, we believe that the court, in *Aluli*, could have, on its motion, considered whether the facts of the case gave rise to a defense of retaliatory eviction, as stated in this opinion. In the event, however, that *Aluli* expressly or impliedly, forecloses the assertion, wherever appropriate, of an affirmative defense of retaliatory eviction, we modify or limit *Aluli* to that extent.

In the present case, tenants' defense of retaliatory eviction is based primarily on the contention that appellee's conduct was in retaliation for the tenants' exercise of the statutory right, pursuant to HRS § 205-4, to appear and present testimony before the Commission on an application for redesignation of land in Waikane Valley. In our opinion, the tenants' basis for asserting the defense of retaliatory eviction is distinct from that asserted by the tenant in the *Aluli* case, and warrants independent consideration.

Appellee argues that the tenants' defense of retaliatory eviction must fail because: (1) the tenants whose rented premises are restricted to use as residential sites, do not qualify under HRS § 521-74(a) of the Residential Landlord-Tenant Code to assert the retaliatory defense and (2) on authority of *Aluli v. Trusdell, supra*, such a defense is not available to tenants whose rented premises are being used for commercial purposes only.

HRS § 521-74(a) provides in part:

> [N]o action or proceeding to recover possession of the dwelling unit may be maintained against the tenant, nor shall the landlord otherwise cause the tenant to quit the dwelling unit involuntarily, nor demand an increase in rent from the tenant; nor decrease the services to which the tenant has been entitled, after:
>
> (1) The tenant has complained in good faith to the department of health, landlord, building department, office of consumer protection, or any other governmental agency concerned with landlord-tenant disputes of conditions in or affecting his dwelling unit which constitutes a violation of a health law or regulation or of any provision of this chapter; or
>
> (2) The department of health or other governmental agency has filed a notice or complaint of a violation of a health law or regulation or any provision of this chapter; or
>
> (3) The tenant has in good faith requested repairs under section 521-63 or 521-64.

It is true that the conduct of the tenants herein does not fall within any of the enumerated subsections of HRS 521-74(a). But the Code does not purport to be the sole exclu-

sive expression of the rights and remedies available to landlords and tenants. Section 3(a) of chapter 521 states:

> *Supplementary general principles of law, other laws, applicable.* (a) Unless displaced by the particular provisions of this chapter, the principles of law and equity . . . supplement its provisions.

This jurisdiction has recognized the validity of equitable defenses in summary possession actions. *Island Holidays v. Fitzgerald*, 58 Haw. 552, P.2d (1978). For similar holdings in other jurisdictions, *see Bowles v. Blue Lake Development Corporation*, 504 F.2d 1094 (5th Cir. 1974); *Cornell v. Dimmick*, 73 Misc.2d 384, 342 N.Y.S.2d 275 (1973); *Markese v. Cooper*, 70 Misc.2d 478, 333 N.Y.S.2d 63 (1972); *Portnoy v. Hill*, 57 Misc.2d 1097, 294 N.Y.S.2d 278 (1968).

One such defense which has been recognized in other jurisdictions relative to residential tenants and incorporated into their common law is the doctrine of retaliatory eviction.[4] *Dickhut v. Norton*, 45 Wis.2d 389, 173 N.W.2d 297 (1970); *Schweiger v. Superior Court of Alameda County*, 3 C.3d 507, 90 Cal. Rptr. 729, 476 P.2d 97 (1970); *Edwards v. Habib*, 397 F.2d 687 (D.C.Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Portnoy v. Hill*, *supra*. This doctrine was created by the courts to protect residential tenants from eviction procedures used by landlords to retaliate against tenants who reported building code violations and in other ways acted to protect their rights. *Edwards v. Habib*, *supra*; 2 Powell, Real Property, ¶ 225[2][b].

In the leading case of *Edwards v. Habib*, *supra*, the District of Columbia appellate court recognized the doctrine as a valid defense in an action for possession on the theory that to permit landlords to intimidate tenants for the reporting of sanitary code violations to the appropriate agencies would frustrate the intent of Congress in enacting the housing and sanitary codes. The legislative purpose behind the codes was to secure safe and sanitary places for the city's residential

[4] *See* Statutory and Reporter's Notes to Sections 14.8 and 14.9 of Restatement (Second) of Property (1977).

tenants to live. Since effective implementation and enforcement of the codes depended in part on the initiative of the public in reporting violations, much of the remedial effect of the codes would be lost if the court allowed the landlord to regain possession of the premises in this manner. In that case, the court held the D.C. statute permitting a landlord to terminate a month-to-month tenancy on 30 days notice, and the statute permitting a landlord to bring ejectment or summary proceedings against a holdover tenant[5] inapplicable where a retaliatory motive was proven.

Although most courts since the decision in *Edwards v. Habib*, *supra*, have been concerned with protecting the rights and duties of residential tenants to report housing and health code violations, *Parkin v. Fitzgerald*, 240 N.W.2d 828 (Minn. 1976); *Clore v. Fredman*, 59 Ill.2d 20, 319 N.E.2d 18 (1974); *Cornell v. Dimmick*, *supra*; *Markese v. Cooper*, *supra*; *Dickhut v. Norton*, *supra*; *Schweiger v. Superior Court of Alameda County*, *supra*; the doctrine has been applied in instances where the tenants have asserted legal rights unrelated to housing conditions. A case in point is *Pohlman v. Metropolitan Trailer Park, Inc.*, 126 N.J.Super. 114, 312 A.2d 886 (1973). In that case, plaintiffs mobile home owners sued the owners and operators of a trailer park to recover damages for wrongful eviction under the state's Tenants' Reprisal Act.[6] Plaintiffs had sought rezoning of the trailer park area from industrial use to residential use in an effort to protect them-

[5] The court said at 701-02:

> The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself. . . .

[6] The Tenants' Reprisal Act provided in part that no landlord could dispossess a tenant:

> (a) As reprisal for tenant's efforts to secure or enforce any rights under the lease or contract, or under the laws of the State of New Jersey or its governmental subdivisions, or of the United States or,
>
> . . . .
>
> (b) As a reprisal for the tenant's being an organizer of, a member of, or involved in any activities of any lawful organization. . . . .

selves from defendants' sale of the property. The defendants attempted to block the rezoning in order to preserve the value of the site for future sale as well as to prevent imposition of housing code and other requirements which the mobile homes could not meet. The New Jersey court construed the Tenants' Reprisal Act to apply to the case even though the statute did not expressly refer to the tenants' activities as conduct protected under the statute. Recognizing that the primary evil sought to be remedied by the Act was reprisals by landlords against tenants' exercise of "housing" rights, nevertheless, the court said that the significant elements in the statute were "rights and repri[illegible]". The court held that the Act was applicable to the ten[illegible]xercise of their right to petition the local government [illegible]ing ordinance amendments which they reasonably c[illegible]ered affected their tenancy rights. The court found that the controversy over zoning matters were quite common in disputes between residential tenants and landlords, and hence, the tenants' conduct was "germane" to the tenant-landlord relationship. The court further said that the result in the case would have been the same even if the Act was found to be inapplicable to the tenants' conduct since the legislative intent as evidenced by both the Act and another New Jersey statute enacted to protect mobile home owners was to protect residential tenants who had long been recognized as having unequal bargaining power with landlords.

In the case of *S. P. Growers Association v. Rodriguez*, 17 C.3d 719, 131 Cal. Rptr. 761, 552 P.2d 721 (1976), the California appellate court held that the defense of retaliatory eviction was available to defendants-tenants in an unlawful detainer proceeding brought by the plaintiff-landlord. The tenants were lemon pickers who were quartered in company owned housing. In the wake of a dispute between the plaintiffs and the defendants about a work related matter, the tenants filed a suit against the landlord charging a violation of the Federal Farm Labor Contractor Registration Act. The landlord immediately served eviction notices on the tenants. The court held that the defense of retaliatory eviction was a valid defense assertable by the defendants-tenants. The

court reasoned that if the landlord were permitted to evict the tenants in retaliation for the suit brought by the tenants under the federal statute, the enforcement of the federal act could be emasculated. The court said that the statutory public policy against violations of the federal statute must be protected.[7]

In *Robinson v. Diamond Housing Corporation*, 463 F.2d 853 (D.C.Cir. 1972), a residential tenant appealed from a summary judgment in favor of the landlord in the landlord's possessory action. The tenant, who had successfully defended against the landlord in a prior possession proceeding, alleged that the landlord was bringing eviction proceedings in retaliation for the tenant's defense in the prior suit. The landlord argued that since he was unwilling to make repairs to the rental unit as required under the housing code, and since the unit could not be rented in its present condition, he should be permitted to withdraw the unit from the rental market. The court held that the defense of retaliatory eviction was available to the tenant in this situation just as it had been held to be a valid defense in *Edwards v. Habib, supra*. The court said that if the landlord's actions were motivated by a desire to punish the tenant for exercising her rights or to chill the exercise of similar rights by other tenants, then the possessory action was impermissible.

In the case before this court, the tenants exercised their statutory right to appear before the Commission at a public hearing and present testimony relevant to amendments to district boundaries as provided for in HRS § 205-4. At the time of the Commission's hearing in 1974 to redesignate the lands of Waikane Valley, HRS § 205-4 read as follows:

> After sixty days but within one hundred and twenty days of the original receipt of a petition, the commission shall advertise a public hearing to be held on the appropriate

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[7] The court said at 17 C.3d at 728:

> In a retaliatory eviction proceeding, the crucial question is not whether the statute is designed to aid tenants, but whether it depends for its effectiveness on private initiative and would thus be emasculated by allowing punitive eviction. . .

island in accordance with the requirements of section 205-3. The commission shall notify the persons and agencies that may have an interest in the subject matter of the time and place of the hearing. . . .

It is clear that the legislative objective of providing for public notice and for a public hearing before the Land Use Commission was to encourage public participation in agency decision-making. The legislature expressly stated that "lessees" were among those of the public whose views were pertinent to proposed land use changes.[8] The tenants in this case are in a situation similar to that of lessees.

Recent amendments to chapter 205 reinforce such a conclusion. The 1975 amendment to HRS § 205-4 requires that the Commission conform to more stringent requirements in the area of notice to the public and the conduct of its public hearings.[9] The present version of HRS § 205-4(e)(3) expressly states that all persons "who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately be affected by the proposed change that their interest in the proceeding is clearly distinguishable from that

[8] Prior to the 1975 amendments to HRS chapter 205, § 205-3 mandated that a public hearing be held and notice thereof published prior to final adoption of district boundaries within each county. Paragraph two of this section stated:

At the hearing, interested owners, lessees, officials, agencies, and *individuals may appear and be heard.* They shall further be allowed at least fifteen days following the final public hearing held in the county to file with the commission a written protest or other comments and recommendations. (Emphasis added.)

[9] *Amendments to district boundaries . . . .*

(b) [Conduct of the public hearing are to be in conformity with the provisions of the Hawaii Administrative Procedures Act relevant to "contested cases."]

(c) [N]otice of the hearing together with a copy of the petition shall be served . . . [on] all persons with a property interest in the land recorded at the department of taxation. In addition, such notice shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings, and shall be published at least once in a newspaper in the county in which the land sought to be redistricted is situated as well as once in a newspaper of general circulation in the State at least *thirty* days in advance of the hearing . . . . [The notice must contain detailed information as required by HRS § 91-9.] (Emphasis added.)

. . . .

of the general public . . ." shall be permitted to intervene as parties, and that representatives of a citizen or community group who indicate a desire to express the views of the shall be permitted to testify at the hearing.[10]

We are of the opinion that the legislative intent of providing public hearings prior to amending district land use boundaries would be frustrated if the appellee were permitted to retaliate against the tenants for opposing land use changes in a public forum. In this case, as in *Edwards v. Habib, supra*, the effectiveness of the statutes, HRS § 205-4, depends primarily on private initiative. Furthermore, [illegible] *Silman v. Metropolitan Trailer Park, Inc., supra*, the tenants' conduct in exercising their right before the Commission was one which they reasonably considered affected their property interest as tenants. Thus, we are of the opinion that where a tenant asserts a statutory right, in the protection of his property interest as a tenant, and as a result the landlord seeks to dispossess the tenant through summary possession proceedings, the tenant can assert an affirmative defense of retaliatory eviction. Our willingness to so conclude is premised not only on safeguarding the effectiveness of the statutes involved, but substantially on the recognition of the salutary policy of protecting the property interests of the tenants from retaliating landlords.[11]

[10] *Amendments to district boundaries. . . .*

(e) [A]gencies and persons may intervene in the proceedings in accordance with this subsection.

. . . .

(4) All other persons may apply to the commission for leave to intervene as parties. Leave to intervene shall be freely granted, ...

(f) Together with other witnesses that the commission may desire to hear at the hearing, *it shall allow a representative of a citizen or a community group to testify who indicates a desire to express the view of such citizen or community group concerning the proposed boundary change.* (Emphasis added.)

[11] The legislative history of HRS § 521-74 indicates that when the predecessor provision was first enacted as Act 41 and designated as HRS § 666-34, the primary purpose was to encourage the repair of substandard housing conditions and to provide tenants with protection from evictions and rent increases by landlords for actions taken by tenants to remedy unsafe or unsanitary conditions. Standing Committee Report Number 485-70, House Bill 43. In 1972, when the legislature

The tenants' response to the motion for summary judgment created a genuine issue as to whether appellee's primary motive in terminating the tenancies was to retaliate for the opposition by the tenants to the proposed redesignation of the Waikane Valley lands. We hold that proof of these facts, by a preponderance of evidence, would support the affirmative defense of retaliatory eviction asserted by the tenants, and that the motion for summary judgment should have been denied. However, this does not mean that the tenants are entitled to remain in possession in perpetuity. Subsequent dissipation of the landlord's illegal purpose and the landlord's legitimate reasons for terminating tenancy is a factual question to be decided by the trier of fact.[12] *Edwards v. Habib*, *supra* at 702.

We find no reason to deny non-residential tenants the remedy of raising a defense of retaliatory eviction where, as in this instance, the statutory right being exercised pursuant to HRS § 205-4 is equally applicable to non-residential tenants and the exercise of that right by these tenants is likewise to protect their property interests in their tenancies.

We note that the Restatement (Second) of Property, section 14.8, confines the definition of retaliatory conduct to situations involving residential housing, and that the American Law Institute takes no position on whether or not the definition should be extended to commercial or industrial

Footnote[11] Continued
enacted the Residential Landlord-Tenant Code, it removed the retaliatory provision from chapter 666 and enacted it as HRS § 521-74, amending the provision to include as protected conduct, complaints by tenants for other land-lord tenant disputes, in addition to health-related disputes.

[12] *See* comment *i* of section 14.8 of the Restatement (Second) of Property which states the following:

> The primary motivation of the landlord in exercising his right may be retaliatory as of one particular time and not retaliatory at a later date. It is a question of fact each time the landlord acts whether that particular action is retaliatory. It is relevant evidence, but not conclusive, that the same action was found to be retaliatory at an earlier date. Factors relevant in determining whether a previous determination of retaliatory action has continued significance will be the length of time that has elapsed since the previous determination and whether the tenant has repeated the acts which previously caused the landlord to retaliate.

property.[13] The few appellate courts which have ruled on the question of permitting commercial tenants to raise the defense of retaliatory eviction have held that the issues raised by such tenants were collateral to the issue of the right to possession of the leased premises, and therefore, not a cognizable defense in summary possession proceedings. *Rossow Oil Co., Inc. v. Heiman*, 72 Wis.2d 696, 242 N.W.2d 176 (1976); *Mobil Oil Corporation v. Rubenfeld*, 48 A.D.2d 428, 370 N.Y.S.2d 943 (1975); *Clark Oil & Refining Corporation v. Leistikow*, 69 Wis.2d 226, 230 N.W.2d 736 (1975); *Clark Oil & Refining Corporation v. Thomas*, 25 Ill. App.3d 428, 323 N.E.2d 479 (1974). *Cf. William C. Cornitius, Inc. v. Wheeler*, 276 Or. 747, 556 P.2d 666 (1976), where the court refused to extend the defense of retaliatory eviction to a commericial setting, and recognized that the defendant-tenant had available other remedies for damages against the plaintiff-landlord for the plaintiff-landlord's violation of anti-trust laws and regulations of the Federal Energy Administration.

However, in our opinion, wherein as we have in this case applied a two-prong test, and both residential and non-residential tenants fulfill both of the tests, we perceive no justifiable legal premises to distinguish between the two classes of tenants. We, therefore, conclude that the affirmative defense of retaliatory eviction is available to both types of tenants, and the trial court erred in its conclusion of law.

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE AS TO A MATERIAL FACT ON THE ISSUE OF THE PROPER PERIOD FOR NOTICE OF TERMINATION OF TENANCY.

We have held that the trial court erred in concluding that, as a matter of law, the defense of retaliatory eviction is not available to the tenants.

[13] See n. 4, *supra*. The Restatement (Second) of Property § 14.8 confines the definition of retaliatory conduct to situations involving residential housing. The Restatement states:

> The Institute takes no position at this time as to whether or not the definition of retaliatory action for the purposes of § 14.9 should be extended to . . . commercial or industrial property.

In addition, a genuine issue as to a material fact exists in regards to the proper period for notice of termination of tenancy of the residential tenants herein.

HRS § 521-71 provides the following:

> Termination of tenancy; landlord's remedies for holdover tenants. (a) When the tenancy is month to month, the landlord or the tenant may terminate the rental agreement upon his notifying the other at least *twenty-eight days* in advance of the anticipated termination *or in cases of voluntary demolition of the dwelling units, ninety days in advance of the anticipated demolition* . . . (Emphasis added.) We find, taking the pleadings, depositions, interrogatories, and admissions on file, together with the affidavits, Rule 56(c), H.R.C.P., *Technicolor v. Traeger*, 57 Haw. 113, 551 P.2d 163 (1976); *Gum v. Nakamura*, 57 Haw. 39, 549 P.2d 471 (1976), and drawing inferences from the underlying facts contained in the materials in the light most favorable to the tenants, *Gum v. Nakamura*, *supra* at 42-43, that there existed a material fact in genuine issue on a procedural question, to wit: whether or not appellee intended to demolish the dwelling units.

Case is remanded for further proceeding in accordance with this opinion.

C. Michael Hare for defendants-appellants.

Allen R. Hawkins for plaintiff-appellee.

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LENA ROBINSON,

Appellant,

v. No. 24,508

DIAMOND HOUSING CORP.,

Appellee.

APPEAL FROM THE DISTRICT OF
COLUMBIA COURT OF APPEALS

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REFERENCES TO RULINGS

1. Oral rulings of trial court denying motions for continuance, motion to amend answer, and granting motion for summary judgment. (Record, pp.1-47).

2. Opinion of District of Columbia Court of Appeals. 267 A.2d 833 (1970).

STATEMENT OF ISSUE PRESENTED

Did the trial court err in granting appellee summary judgment for possession and precluding appellant from raising her defenses based on appellee's retaliatory motive and violations of the District of Columbia Housing Regulations?

This case has been before this Court in the following instances:

1. Motion for Stay Pending Appeal, denied, Order of Jan. 6, 1970 (Tamm, Leventhal, & Robb, JJ.).
2. Suggestion for Rehearing En Banc, denied, Order and Statement of April 14, 1970 (Wilkey, J., not participating).
3. Motion to Proceed In Forma Pauperis, granted, Order of July 31, 1970 (Wright, C.J.).
4. Petition for Allowance of Appeal, granted, Order of Sept. 25, 1970 (Fahy & McGowan, JJ.).

STATEMENT OF THE CASE

On May 2, 1968, Lena Robinson and her four children moved into the house owned by the Diamond Housing Corporation at 1716 Eighth Street, N.W. Eight days after she failed to pay the rent falling due on July 2, she was sued by Diamond Housing for possession of the premises.[1/] Mrs. Robinson successfully defended that suit by establishing to a jury that her lease was voided by the existence of substantial housing code violations at the commencement of her tenancy. On appeal, the District of Columbia Court of Appeals (DCCA) affirmed the judgment for Mrs. Robinson. Diamond Housing Corp. v. Robinson, 257 A.2d 492 (1969).[2/]

The evidence which the jury ultimately accepted as reflecting the conditions of Mrs. Robinson's home included proof of the existence of the following serious housing defects: large pieces of plaster were missing throughout the house; a back bedroom wall was unattached to the ceiling; nails protruded along the side of the

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1/ See Diamond Housing Corp. v. Robinson, LT 62391-68, Opinion and Order of Belson, J., Oct. 16, 1968, on file in the record of this appeal.

2/ A petition for review of this decision was denied. D.C. Cir. No. 23,891, Order of Sept. 25, 1970.

stairway; a pane of glass was missing from a living room window; a kitchen window frame was out of position leaving an opening in the wall to the outdoors; no front step to the porch existed; and the porch was so shakey that the ground could be seen through its boards.[3] Diamond Housing failed to prove that any of these defects were subsequently repaired; indeed, it admitted that they still existed when the instant suit was brought in December 1969, one and one-half years after Diamond Housing first knew of them.[4]

In an attempt to circumvent the adverse rulings of the DCCA and the trial court, Diamond Housing, on December 2, 1969, again filed suit against Mrs. Robinson. This suit sought possession of Mrs. Robinson's premises and was based on the alleged expiration of a thirty-day notice to quit to the tenant. (R-49). On December 16, Mrs. Robinson filed her answer and jury demand to this action. (R-51). She alleged, inter alia, that Diamond Housing's suit must fail because it was provoked by an

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3/ See Diamond Housing Corp. v. Robinson, supra, note 1, Opinion of Belson, J., at 2-3.

4/ See Affidavit of Barry Mankowitz, Record at 64 (hereinafter cited R-64).

illicit retaliatory intent and was brought by a landlord who had knowingly continued to lease unsafe and unsanitary housing. The case was then certified to the jury calendar.

On December 17, Diamond Housing filed a motion for summary judgment. (R-60). This motion was supported by affidavits attesting that a thirty-day notice had been served on Mrs. Robinson and that the corporation was "unwilling to make any repairs to the premises involved herein and it [did] not presently desire to continue to rent the premises. . . ." (R-64).

The hearing on that motion was unilaterally set by counsel for Diamond Housing for December 23. On the morning of this date an appearance was made by Christopher Brown, Esq., for Mrs. Robinson in order to request a continuance of the summary judgment hearing due to the temporary absence from the District of the defendant's attorney, Richard B. Wolf, Esq. Landlord and Tenant Judge Hyde denied this motion, setting the hearing for later that same day.

At the hearing the Landlord and Tenant Court again denied Mrs. Robinson's motion for a continuance on account of her counsel's absence. It also denied her motion

to schedule the hearing at least in accord with the timing and notice provisions of General Sessions Rule 56(c). It denied Mrs. Robinson's motion to amend her answer while granting Diamond Housing the same relief regarding its complaint. (R-65). Finally, the judge ruled that summary judgment was appropriate because no material relevant facts were in dispute. It reached this conclusion by ruling as a matter of law that Diamond Housing's motives in seeking to evict Mrs. Robinson were irrelevant to this suit. The defense of retaliatory eviction was explicitly recognized as not being available to this tenant, nor was a defense based on housing code violations. The judge ruled that all Diamond Housing need establish to evict Mrs. Robinson was the service and expiration of a thirty-day notice to quit. Because this fact was not disputed, Judge Hyde granted summary judgment for possession for Diamond Housing.

Pending appeal of this decision, Mrs. Robinson sought a stay of her eviction from the premises. This was denied by the trial court, the DCCA, and a division of this Court. While Mrs. Robinson's suggestion for a rehearing en banc of this latter decision was pending before the full Court, she was forced to abandon her run-down

premises in order to safeguard the health and welfare of her family. As a consequence of this change of circumstances, Mrs. Robinson's suggestion for a rehearing en banc was denied. See Robinson v. Diamond Housing Corp., D.C. Cir. No. 23,850, Statement of April 14, 1970 (Robinson, J.).

Mrs. Robinson's appeal to the DCCA on the merits in this second possessory action resulted in an affirmance of the trial court. 267 A.2d 833 (1970). The instant appeal to this Court followed.

SUMMARY OF ARGUMENT

Appellant argues at the outset that she was prejudiced by two procedural-issue errors of the trial court. The court was wrong in refusing to continue the hearing date on appellee's motion for summary judgment which was unilaterally set by counsel for appellee. Because the rules of the Landlord and Tenant Branch required that appellant be given more time in which to respond to the motion, and because she should have been granted a short stay until her attorney returned from an out-of-town trip, the trial court erred in making appellant's substitute counsel go forth on the hearing date.

The second procedural error was the trial court's refusal to permit appellant to amend her answer to assert the added defense of inadequate service of process. In so ruling, the trial court failed to comply with D.C. Code § 13-101, which requires it to adopt as much as is practicable the Federal Rules of Civil Procedure, which would permit amendment as of right in this instance. The trial court also erred in ruling that actual receipt of process waived appellant's right to receive it in the statutorily required manner.

On the merits, the trial court was incorrect in ruling that appellee was entitled to a judgment for possession as a matter of law merely upon proof of having served appellant with a thirty-day notice to quit her premises. Appellant should have been permitted to go to trial on her defenses based on retaliatory eviction and existing housing code defects. The trial court was wrong in ruling that appellant was not entitled to rely on the defenses set forth in Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (1968), and now in the District of Columbia Housing Regulations § 2910. It further erred in permitting appellee, who admittedly refused to make the needed repairs at appellant's premises, to use the court system before complying with the District of Columbia law. The District of Columbia Court of Appeals compounded this error by giving District of Columbia landlords a route with which to bypass the case law in this jurisdiction which was meant to bolster the Housing Regulations and by ruling in a manner so as to further deplete the housing stock in the District.

ARGUMENT

I. APPELLANT'S FAILURE TO FILE COUNTERING AFFIDAVITS OF FACT IN THE TRIAL COURT DOES NOT PRECLUDE HER FROM RAISING HER LEGAL ISSUES ON APPEAL

The District of Columbia Court of Appeals in part based its affirmance of the trial court on the notion that, because Mrs. Robinson had not filed affidavits countering Diamond Housing's factual assertions, no material issues of fact were in dispute and summary judgment was appropriate. 267 A.2d at 835. The DCCA failed to appreciate, however, that (1) the trial judge accepted Mrs. Robinson's counter assertions, but deemed them legally irrelevant, and (2) the introduction of formal affidavits was precluded by the trial court's refusal to continue the summary judgment hearing.

The ruling of the trial court was in no way based on appellant's failure to meet the requirements of Gen. Sess. R. 56(e). See transcript passim; Robinson v. Diamond Housing Corp., D.C. Cir. No. 23,850, April 14, 1970 (en banc statement), slip opinion at 4 n.7. Instead, the trial judge took the view that the facts set forth by Diamond Housing were irrelevant to its suit for possession of Mrs. Robinson's home. Accordingly, Mrs. Robinson's

failure to specifically reiterate her assertions regarding Diamond Housing's purported illicit motives was of no consequence.

Second, even if it were crucial to Mrs. Robinson's case that countering affidavits be produced, she was unfairly denied an opportunity to assemble these documents because of the timing of the premature hearing in which she was forced to plead her case. See Gen. Sess. R. 56(f). Mrs. Robinson was arbitrarily denied a brief continuance which could have enabled her to meet Rule 56(e).

The date for the summary judgment hearing was set unilaterally by counsel for plaintiff for December 23, 1969. However, General Sessions Rules 6(e) and 56(b) & (c) and Landlord and Tenant Rules 4(e) and 11, which govern the timing of the hearing, required that it be held no earlier than December 24, 1969.[5/] Mrs. Robinson's substituted

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5/ G.S. Rule 56(c), made applicable to this case by L&T Rule 11, requires that a motion for summary judgment "be served at least five days before the time fixed for hearing." When service is made by mail, as in this case, one additional day is added to the prescribed period. G.S. Rule 6(e); L&T Rule 11. Sundays (in this case December 21) are excluded from the computation. G.S. Rule 6(a). Thus, the motion having been mailed to defendant's counsel on December 17, it was not ripe for hearing until at least December 24. See Brief for Appellant, D.C.C.A. No. 5194, at 8-11, on file in record in this appeal.

counsel could surely have utilized that extra day. In a situation where the proper legal resolution is as complicated as it is in this case, twenty-four hours of preparation time serve much better than do two hours.

Appellant further contends that the trial court abused its discretion in not granting a two-week continuance of the summary judgment hearing until her counsel returned from a trip away from the District of Columbia. The denial of a continuance greatly hindered appellant's defense, denying her newly-found counsel of an opportunity for full preparation and the filing of opposing affidavits.[6/]

6/ See Brief for Appellant, D.C.C.A. No. 5194, at 5-8.

II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO AMEND HER ANSWER TO ASSERT A JURISDICTIONAL DEFENSE

Appellant moved at the summary-judgment hearing to amend her answer to assert the additional defense of lack of adequate service of process (R-26). The trial judge denied this motion, stating as his grounds:

> You can't come in, after you've asserted all your real defenses here, and think up that at the last minute after we are engaged here in a motion for summary judgment. (R-26).

He further stated that Mrs. Robinson must have obtained actual notice of the suit and therefore no prejudice would result from his denial of her motion to amend.

The DCCA elaborated on this reasoning, ruling that a landlord-and-tenant-court defendant, unlike any other civil litigant in the District of Columbia, can only challenge service of process by filing a motion to quash prior to filing his answer. 267 A.2d at 834 n.2, citing L&T Rule 4(d).

Under the rules of the Court of General Sessions, a defendant may amend his answer as of right "at any time within 10 days after it is served." G.S. Rule 15(a). See

also Fed. R. Civ. P. 15(a). Amendments relating to the defense of insufficiency of process are not waived when made by motion pursuant to Rule 15(a) and must be granted as a matter of course. See G.S. Rule 12(h)(1); 1A Barron & Holtzoff, Federal Practice & Procedure § 370 (1969 Supp.). Thus, a defendant has until ten days after the filing of his answer in which to object to the jurisdiction of the court.

As the record indicates, Mrs. Robinson's answer was filed on December 16, 1969. Her motion to amend was made on December 23, within ten days thereafter. She concludes that accordingly the trial court erred in denying her motion to amend because she should have been permitted to amend as of right.

Appellant contends that G.S. Rules 15(a) and 12(h)(1) govern this case even though they have not been made specifically applicable to Landlord and Tenant Branch cases by Landlord and Tenant Rule 11. Indeed, nowhere in the specific Landlord and Tenant Rules is there a provision permitting any party to amend its pleadings in any respect. Appellant argues that the absurd rigidity which would result from not allowing any party to amend

its pleadings compels a ruling that General Sessions Rule 15 be read into the Landlord and Tenant Rules. In fact, the trial judge must have reached such a conclusion because he did permit Diamond Housing to amend its complaint. (R-40).

Several lines of reasoning can lead this Court to this conclusion. First, Landlord and Tenant Rule 11 cannot reasonably be read as an exclusive listing of those General Sessions Rules which are operative in the Landlord and Tenant Branch. Nothing in Rule 11's language would require such a narrow reading. The adoption of this narrow construction would lead to harmfully restrictive results. The better view, it clearly seems, should be to apply to the Landlord and Tenant Branch all of those General Sessions procedures which, even though not listed in Rule 11, are nevertheless an intricate part of any fair and just court proceeding, albeit a summary proceeding. There can be no logical reason under which amendment of pleadings cannot and should not be permitted in the Landlord and Tenant Branch.

This result seems compelled by this Court's recent rulings in McKelton v. Brune, ____U.S. App. D.C.

___ , 428 F.2d 718 (1970) and Lee v. Habib, ___ U.S. App. D.C. ____, 424 F.2d 718 (1970). Both pointed to D.C. Code § 13-101 (1967), which requires all General Sessions court rules to "conform as nearly as may be practicable to the forms, practice, and procedure prescribed by the Federal Rules of Civil Procedure. . . ." If local court in forma pauperis procedures, as in McKelton, and procedures for an indigent's receipt of a free trial transcript, as in Lee, are to be as similar as possible in each court system, there seems to be no ground for departing from this rule regarding a defendant's right to amend his answer.[7/]

The second basis for the trial court's denial of Mrs. Robinson's motion to amend -- that timely actual knowledge of having been sued waives a defendant's right to challenge service -- is similarly without valid support, although it seems recently to have been bolstered by the DCCA's opinion in Gordan v. William J. Davis, Inc., ____ A.2d ____ (October 21, 1970). The statute regulating

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7/ Constitutional requirements can also compel this same result. See Lee v. Habib, 424 F.2d at 904.

service of process in a landlord's suit for possession, D.C. Code § 16-1502 (1967), requires that a "diligent and conscientious" effort be made to effect personal service before the process server can resort to a substituted method of service, such as posting. Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F.2d 766 (1950). Statistical information available from court records indicates that this statutory requirement is regularly being abused. See Bell v. Tsintolas Realty Co., ____ U.S. App. D.C. ____, ____ n.7, 430 F.2d 474, ____ n.7 (1970). If the trial court's view of the law were accurate, there would be no effective manner of enforcing this statute. Service of process could be made in any haphazard manner because the only group who could challenge service -- those who know how they were served -- would not be able to do so. Thus, the prophylactic nature of § 16-1502 would be destroyed.

If actual notice were a waiver of a defendant's right to receive process in the statutorily prescribed manner, there seems to be no reason why this Court in Dewey v. Clark, supra, would have gone into detail regarding the manner of service in that instance. If actual notice

constituted a waiver of the jurisdictional defense, such a discussion would have been unnecessary because that defendant had actual notice. Compare Morfessis v. Marvin's Credit, Inc., 77 A.2d 178 (D.C. Mun. App. 1950). Indeed, the DCCA seems on an earlier occasion to have recognized the error of the trial court's ruling. See Lynch v. Bernstein, 48 A.2d 467 (D.C. Mun. App. 1946) (actual receipt of notice to quit is no waiver of right to receive it as statutorily required).

For the reasons stated above, appellant contends that the trial court and the DCCA were incorrect in refusing to permit her to amend her answer in order to assert a jurisdictional defense.

III. APPELLANT WAS ENTITLED TO RAISE THE DEFENSE OF RETALIATORY EVICTION

The trial court and the DCCA both ruled that Mrs. Robinson was legally unable to rely upon the defense of retaliatory eviction as set forth by this Court in Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1016 (1969). Edwards held that a landlord cannot oust his tenant with a suit for possession of his premises in order to punish the tenant for reporting housing regulation violations to governmental authorities. The Edwards doctrine has been reasserted in the recent amendments to the Housing Regulations for the District of Columbia, which were brought to the DCCA's attention at oral argument. The regulations now provide:

> No action or proceeding to recover possession of a habitation may be brought against a tenant, nor shall an owner otherwise cause a tenant to quit habitation involuntarily, nor demand an increase in rent from the tenant, nor decrease services to which the tenant has been entitled, nor increase the obligations of a tenant, in retaliation against a tenant's:
>
> (a) good faith complaint or report concerning housing deficiencies made to the owner or a governmental authority, directly by the tenant or through a tenant organization.
>
> . . .

> (c) good faith assertion of rights under these Regulations, including rights under Sections 2901 or 2902.8/

Subsection (c) further broadens Edwards to prohibit retaliation for asserting in court or elsewhere the right to report housing violations.

The DCCA has attempted to carve out a large exception to this retaliatory eviction doctrine:

> [W]e are of the opinion that the retaliatory defense of Edwards v. Habib . . . is not available to a tenant in a case such as this where she was successful in a prior Landlord and Tenant action and is being evicted after the expiration of a thirty-day notice because the landlord wishes to withdraw the property from the rental market. The Edwards case involved a situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities and it should be, we think, limited to its facts.

But even if Edwards were limited in the narrow manner of the DCCA's emasculated reading, Mrs. Robinson indeed fell within that rule. She sought to assert in defense that Diamond Housing's suit involved a "situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities." (R-30).

8/ Housing Regulations of the District of Columbia § 2910, D.C. Register, Aug. 1970.

Furthermore, the Edwards court made no exceptions in its ruling for those landlords, such as Diamond Housing, who have been precluded from recovering possession due to violations of District of Columbia law. If anything, the Edwards rule should be more readily applicable to such a landlord because its past actions have made its motives highly suspect. Diamond Housing is the party who has blatantly helped perpetuate what the Edwards court referred to as the "appalling housing conditions" [9/] in Washington.

A logical basis might possibly exist for the lower courts' position if they had predicated their ruling on some type of evidentiary principle which regarded the possibility of a retaliatory motive in a case such as this to be exceedingly remote. In such a case the exclusion of a retaliatory-motive defense might perceivably be arguable. But in the instant case, the exact opposite tendency exists. As counsel for appellee admitted below: "Any jury is going to have to practically say that there is retaliation." (R-39). Similarly, the trial judge came to the conclusion that "there wouldn't be but

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9/ 130 U.S. App. D.C. at 140, 397 F.2d at 701 (footnotes omitted).

one way this issue could be decided by the jury . . . ." (R-41). Thus, both parties and the trial court have been unanimous in concluding that Diamond Housing would be found to harbor a retaliatory intent if the issue were permitted to go to the jury.

The logic in precluding a tenant who has successfully defended a suit for possession from utilizing in a second suit a retaliatory eviction defense remains elusive. The public policy behind Edwards is no less compelling in this case: "To permit retaliatory evictions [still] . . . would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington."[10/] Indeed, the need to protect an already victimized tenant takes on increased importance.

The trial judge's and the DCCA's defiant attitude toward Edwards may have partially been predicated upon a concern that the landlord will be unable to disprove the retaliatory nature of his motive. But this inherent difficulty has directly been acknowledged and dealt with in Edwards. This Court recognized that questions of

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10/ Id. at 139-40, 397 F.2d at 700-01.

permissible or impermissible purpose will present the need for determinations that are "not easy." It noted, however, that the problem is not unique and courts must deal with it "in a host of other contexts."[11] The Court nevertheless sided with General Sessions Chief Judge Greene in concluding:

> There is no reason why similar factual judgments cannot be made by courts and juries in the context of economic retaliation [against tenants by landlords] for providing information to the government.[12]

The Edwards court seems to have foreseen clearly a situation such as the present one. It made clear that a tenant who was successful on a first suit need not be "entitled to remain in possession in perpetuity."[13] The landlord can gain possession after his "illegal purpose is dissipated."[14] In the present case, Diamond Housing should

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11/ Id. at 142, 397 F.2d at 703.

12/ Id.

13/ Id. at 141, 397 F.2d at 702.

14/ Id.

have no difficulty in establishing the sincerity of its motives if only it would conform to the law by correcting the wretched conditions existing in Mrs. Robinson's home. If Diamond Housing would begin to comply with the housing laws of the District of Columbia, its stature in the eyes of a jury would be greatly enhanced. It should only be after full repair has been accomplished that the courts of this jurisdiction can come to Diamond Housing's aid.

The instant suit for possession not only violates rights afforded by the Housing Regulations; it also threatens the very integrity of the judicial system. To permit a landlord to use the judicial process to evict a tenant because of that tenant's use of lawful defenses in a prior judicial action would make a mockery of the judicial system. The tenant's trial in the first case would be a futile gesture, serving as a means to undermine public policy, the judicial process, and those who seek relief in it. A defense of housing code violations would have no legal significance if a tenant who prevails in a suit for possession promptly be evicted in a second possessory action because of her reliance on those defenses. No tenant would be foolhardy enough to assert

housing code violations as a defense in a suit for possession when the certain and ironic result would be to prepare the landlord's easy way to an unchallenged eviction in a second summary action.

In addition to the right to challenge the notice to quit on the grounds that it is retaliatory, appellant must also have the right to challenge as retaliatory appellee's desire to remove the property from the rental market. If the Housing Regulations are to have meaning, the court cannot permit a corporation or individual landlord to close down a rental unit in order to retaliate against the tenant for his having exercised rights under the Housing Regulations.

This is not the first time a court has been asked to prevent the closing of a business or to otherwise restrict business operations in order to safeguard basic statutory rights. A similar situation has been presented in the field of labor law. In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), the Supreme Court refused to allow a corporation to close down one of its units in retaliation for protected activity. The

court held that the action of the corporation was impermissible because it would have a chilling effect upon the exercise of certain legislatively guaranteed rights. The specific facts and the statute involved in Darlington are of course different from the instant case, but the rationale of that decision is no less significant.

A legislative and regulatory scheme existed in both Darlington and the instant case to protect a special class of persons. The safeguards in Darlington were directed at members of labor organizations; here the protected class consists of tenants living in substandard housing. In both situations the protective scheme was silent on the specific question of whether a regulated party may close down one of its units in order to undercut the purposes which the safeguards were designed to afford. When faced with this question in Darlington, the Supreme Court realized that prevention of such action by the corporation was necessary if the labor act was to be meaningful; it accordingly read protection from such action into the statute.

This Court should make a similar ruling in the instant case and hold that this landlord may not close

down his rental unit if his purpose is retaliatory against a tenant for the tenant's reliance on housing violations as a defense to a suit for possession.[15/] The issue is vital to the maintenance of an adequate supply of safe and sanitary housing in the District of Columbia and for the protection of rights guaranteed to tenants by the Housing Code.

The Court should furthermore establish guidelines similar to those adopted by the Supreme Court in analogous labor cases designed to assist the trier of fact in resolving the factual problems which will be presented.[16/] The Court should rule that, where a notice to quit is issued by a landlord after the tenant has successfully defended a prior suit for possession on the ground of housing code violations, the notice to quit be deemed "inherently destructive" of basic tenant rights, that no specific proof of retaliatory motive is needed, and that

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15/ Public records on file with the District of Columbia Recorder of Deeds reflect that the appellee corporation is listed as the owner of approximately 290 lots in the District of Columbia.

16/ See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Lane v. NLRB, 135 U.S. App. D.C. 372, 418 F.2d 1208 (1969).

the trier of fact can find that the suit for possession is impermissibly motivated and hence barred, even if the landlord introduces evidence that the notice to quit was motivated by business considerations.[17/] The notice to quit in the second action should be deemed to carry with it its "own indices of [retaliatory] intent",[18/] making specific proof of retaliatory motive unnecessary to defeat a claim by the landlord of a legitimate business purpose.[19/] Further, the burden of proof should be on the landlord to establish that he was motivated by overriding legitimate business considerations, since proof of motivation is most accessible to him.[20/]

As the Supreme Court has noted in labor cases, situations such as the instant one may present a complex of motives calling for the trier of fact to weigh the interests of both sides and to reach a decision "preferring one motive to another" in light of the provisions of the legislation involved and its policy.[21/] In Edwards v.

17/ Cf. NLRB v. Great Dane Trailers, Inc., supra.

18/ See NLRB v. Erie Resistor Corp., supra.

19/ Cf. Id.

20/ Cf. NLRB v. Great Dane Trailers, Inc., supra

21/ Cf. NLRB v. Erie Resistor Co., supra.

Habib, this Court ruled "that Congress, by directing the enactment of the housing code, impliedly directed the court to prefer the interests of the tenant who seeks to avail himself of the code's protection." The preceding rules regarding sufficiency of evidence and burden of proof will enable the courts to follow this directive of Congress requiring protection of tenant rights over the interests of a landlord who has flouted the housing laws.

Because the trial court erred in refusing, as a matter of law, to permit Mrs. Robinson to raise the defense of retaliation, the court's decision in granting Diamond Housing summary judgment should be reversed.

IV. APPELLEE SHOULD NOT BE ABLE TO UTILIZE THE COURT SYSTEM TO EVICT APPELLANT UNTIL IT BRINGS ITS PREMISES INTO COMPLIANCE WITH THE HOUSING REGULATIONS.

The "clean hands" doctrine and the integrity of the judicial system require that appellee, who had been found to be in violation of the Housing Regulations, be precluded from using the courts to maintain a suit for possession until it complies with the requirements of the housing code. The directive of the DCCA in both of Mrs. Robinson's appeals, 257 A.2d at 495; 267 A.2d at 835, allowing the landlord to enforce a thirty-day notice to quit through a suit for possession without simultaneously requiring the landlord to correct the housing violations, has authorized the use of the courts by a party who is in clear violation of the law. Appellant urges that this unfortunate guideline be reversed.

It is not novel doctrine to assert that a party in Diamond Housing's position can only invoke a court's relief after it has complied with the law of this jurisdiction and brought its property up to housing code standards.[22] This rule finds its roots

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22/ This precondition has met with approval in Judge Belson's trial court opinion in Mrs. Robinson's first case (pp. 10-11) and in Note, Leases and the Illegal Contract Theory--Judicial Reinforcement of the Housing Code, 56 Geo. L.J. 920, 936 (1968).

in analogous legal precedent.

It has long been established in this jurisdiction that a court's powers cannot be invoked to assist a party who has previously committed an illegal act such as engaging in an illegal contract. Hunter v. Wheate, 53 App. D.C. 206, 239 F. 604 (1923).[23] Diamond Housing has been found to have engaged in illicit conduct which resulted in the voiding of its contract with Mrs. Robinson. Mrs. Robinson sought to establish that Diamond Housing was still engaging in this illicit conduct at the time it filed the instant suit against her. Because it had failed to cease this illegal activity--which was within its power to do--the trial court was obliged not to let itself be used to aid Diamond Housing in its bid to eject her. The trial court should have refused relief at least until the housing code violations were remedied. Mrs. Robinson intended to show at trial that Diamond Housing was still a wrongdoer and therefore the court must refuse to be used as an affirmative instrumentality of injustice; it had no choice but to leave the wrongdoer to its own devices.[24]

23/ Hunter ruled that a woman who had consented to a contract to have performed on her an illegal abortion could not later sue the performing doctor for negligence in performing it. See also Wheeler v. Sage, 67 U.S. (1 Wall.) 518 (1864).

24/ See, e.g., Borden Co. v. Clearfield Cheese Co., Inc., 244 F. Supp 366 (1965), citing Shelley v. Kraemer, 334 U.S. 1 (1948).

Although appellant recognizes that courts will not refuse relief to a party when the wrong done is a thing of the past (cont'd.)

An analogous situation to the present one faced this Court in Olverson v. Olverson, 54 App. D.C. 48, 293 F. 1015 (1923). Mrs. Olverson's former husband had obtained a divorce from her based on adultery. The decree denied her the right to remarry while still a District of Columbia resident. To avoid this ruling she married Mr. Olverson in Baltimore. Mrs. Olverson later sought to obtain a divorce from Mr. Olverson in the District of Columbia courts. This Court refused relief:

> We do not think that the courts of the District can be used for that purpose. The appellant deliberately set at naught a District statute, which she was bound to respect and obey, and she cannot now ask the courts of this jurisdiction to relieve her of the obligations of a relation which she willfully and wrongfully assumed, or to enforce the right to support which would have been hers had the relation been lawfully contracted in the District. 25/

24/ (cont'd.) and collateral to the present action, Brooks v. Martin, 68 U.S. (2 Wall.) 70, 79-80 (1864), appellant asserted below that Diamond Housing's past illegal act--maintaining housing in an unlawful condition--had continued to the present. It therefore cannot be said that the taint from a prior act has in any way dissipated. See Olverson v. Olverson, supra. As the United States Court of Appeals has declared:

> Although most cases in which the clean hands doctrine has been applied are cases in which the cause of action has arisen out of or been the fruit of unconscionable conduct, we do not understand that it is a prerequisite to the application of the doctrine that the cause of action shall have so arisen. It is sufficient to bar relief that plaintiff has been guilty of unconscionable conduct directly related to the cause of action . . . ."

Brantley v. Skeens, 105 U.S. App. D.C. 246, 266 F.2d 447 (1959), citing Mas v. Coca-Cola Co., 163 F.2d 505, 508 (4th Cir. 1947).

25/ 54 App. D.C. at 49, 293 F. at 1016.

Diamond Housing has similarly been found to have entered into an unlawful contract--in its case by renting out substandard housing. It has flouted the District's laws and has challenged the integrity of the court. It has plainly stated it is unwilling to make required repairs. It should not be permitted now to ask the courts to relieve it of its obligations.

Diamond Housing is more fortunate than Mrs. Olverson, however, because it can unilaterally improve its status. By repair it can comply with the housing regulations. After taking this step it can then seek judicial relief.

Another situation of great similarity arose in Edwards v. Habib, supra. The question raised there was how a landlord, once found to harbor a retaliatory intent and therefore precluded from recovery of possession, could ever again gain possession. Edwards solved this problem by stating that once he can prove that this illegal purpose is dissipated, the landlord can act to evict his tenant. 130 U.S. App. D.C. at 141, 397 F.2d at 402.

Diamond Housing should be held to no less a standard. Only when its illegal activity has been dissipated by its actions in repairing the premises, can it then go into court and seek to evict.

This same result is reinforced by that line of cases in

this jurisdiction which requires a court of equity to refuse[26] relief to a party who comes into court with "unclean hands."[27] Having been shown to have deliberately flouted the District's housing laws, Diamond Housing should not be given relief until it rectifies its position and repairs the premises.[28]

To allow Diamond Housing to evict Mrs. Robonson without first complying with the housing regulations would undermine public policy.[29] The need in the District is for more, not less, suitable low-income housing. To permit Diamond Housing to avoid its responsibilities to Mrs. Robinson by taking her premises off the rental market would only tend to exacerbate the present housing shortage crisis.[30] It is against public policy for a

26/ The trial court exercises equity powers. See, e.g., Morrow v. District of Columbia, 135 U.S. App. D.C. 160, 417 F.2d 723 (1969). Cf. Edwards v. Habib, 130 U.S. App. D.C. at 140, 397 F.2d at 701.

27/ See, e.g., Cochran v. Burdick, 67 App. D.C. 87, 89 F.2d 831 (1937); Combs v. Snyder, 101 F. Supp. 531 (1951) (three-judge court), aff'd 342 U.S. 939 (1952).

28/ The three-judge court in Combs v. Snyder declared:

> Few things are clearer than that one who comes seeking protection for conduct that he concedes to be criminal has unclean hands within the meaning of this principle.

101 F. Supp. at 532.

29/ Where a suit in equity concerns the public interest as well as the private interests of the litigants . . . [the 'clean hands'] doctrine assumes even larger and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815 (1945).

30/ Edwards v. Habib, supra, has judicially noted the "appalling condition and shortage of housing in Washington . . . ." 130 U.S. App. D.C. at 140, 397 F.2d at 701.

house to stand empty in a city where adequate dwellings fall far short of the demand for them. An occupied house is financially unproductive to the landlord and of no help in housing a family in dire need of a home. Courts "may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest." Barber-Colman Co. v. National Tool Co., 136 F.2d 339, 344 (6th Cir. 1943). This Court's final resolution to the instant problem should not be one which will encourage a property owner to reduce this city's quantity of available decent housing.

It need not be feared that the resolution proposed by appellant will put the landlord in a straightjacket. Repairing the property is surely in its own best interests, for it is only in this way that it can realize a profit from it. Furthermore, there are other factors which might serve as bona fide reasons for it to terminate the current tenancy. It might prove that the tenant is committing waste on the remainder interest; an individual landlord might seek in good faith to inhabit the premises himself; or he may have been served with a condemnation order.[31/]

31/ Several of a landlord's bona fide reasons for recovering possession are listed at § 2-407 of the American Bar Foundation's Tentative Draft of its Model Residential Landlord-Tenant Code.

It is of profound importance that the integrity of this Court's decisions and the housing code not be undermined. Such would occur if this Court permitted a landlord who was leasing substandard housing to avoid the strictures of Javins v. First National Realty Co., ___U.S. App. D.C. ___, 428 F.2d 1071 (1970), and Brown v. Southall Realty Co., 237 A.2d 834 (1968), cert. denied, 393 U.S. 1018 (1969), by seeking to expeditiously kick out a tenant who has raised or is planning to raise this defense.

The following situation is becoming increasingly common in the Court of General Sessions: A landlord sues a tenant for possession based on nonpayment of rent. If the tenant is fortunate enough to have a lawyer (only about 2% do) and responds by raising a defense based on housing code violations, the landlord immediately seeks to squelch this defense by suing again on the basis of a thirty-day notice to quit.[32/] This move is designed to evict the "troublesome" tenant from the premises without having to upgrade the conditions of the premises so that they meet the housing code. It is an attempt to entirely skirt the public policy as set forth in the housing regulations and prior opinions of this Court.

The landlord should not be permitted to gain relief by one judicial device when he would be unable to do so by proceeding through the normal channels.

32/ See, Cooks v. Fowler, D.C. Cir. No. 24,546, Nov. 13, 1970, slip opinion at 6.

V. THE HOUSING REGULATIONS AND THE PUBLIC POLICY OF THE DISTRICT OF COLUMBIA SHOULD PRECLUDE A LANDLORD SUCH AS APPELLEE FROM REMOVING HIS PROPERTY FROM THE RENTAL MARKET BECAUSE HE IS UNWILLING TO COMPLY WITH THE HOUSING REGULATIONS

The directive which the DCCA gave to appellee and to all landlords in the District -- to avoid compliance with the Housing Regulations and to remove their property from the rental market if they are unwilling[33/] to make it habitable -- will have a serious adverse affect upon both the quantity and quality of housing -- especially low-income housing -- in the District of Columbia. The removal of property from the rental market, irrespective of any retaliatory aspects, will thwart the aim of the Housing Regulations to provide a supply of safe and sanitary housing and will thwart the public policy of Congress and of the District of Columbia. This Court should therefore hold that regardless of the issue of retaliation, a landlord

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33/ The DCCA's general guideline included landlords who are unable to repair their property as well as those who are unwilling to do so. In light, however, of appellee's affidavit supporting its motion for summary judgment in which it stated that it is unwilling to repair the premises, the court is not directly confronted in the instant case with the problems surrounding financial inability to repair.

such as appellee who is unwilling to repair his property and who wishes to remove it from the rental market in order to avoid compliance with the Housing Regulations may not be permitted to do so, and that a tenant may defend against a suit for possession on that basis.

The Housing Regulations evidence the desire of the District's Commissioner and City Council to force landlords to maintain their property in a habitable condition and to prevent the deterioration and decline of the existing housing supply.[34/] The Regulations, especially in light of the explicit direction by Congress for their enactment, also "indicate a strong and pervasive congressional concern to secure for the City's slum dwellers decent, or at least safe and sanitary places to live."[35/]

Indeed, Congress, in various housing acts, has clearly established a policy of eradicating substandard housing conditions and of increasing the supply of safe and sanitary dwellings. It has declared that the national housing policy requires "the elimination of substandard

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34/ See D.C. Housing Regulations § 2101.

35/ Edwards v. Habib, supra, 397 F.2d at 700.

and other inadequate housing . . . and the realization . . . of a decent home and a suitable living environment for every American family."[36/] To underline its concern, Congress has directed that all agencies of the Federal Government "having powers, functions, or duties with respect to housing . . . exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this [the above] Act. . . ."[37/]

The Washington community "is confronted by a serious shortage of housing rentals its resident population

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36/ Section 1 of the United States Housing Act of 1937, 50 Stat. 888, as amended by the Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1401 (1964).

37/ Id. The significance which Congress attached to the full implementation of housing codes is further evidenced by such measures as its requirement that a local community have "workable" programs for community improvement, which specifically encompass the existence and enforcement of housing code designed to provide safe and sanitary buildings, as a condition for obtaining urban renewal funds. Housing Act of 1949, supra, 42 U.S.C. § 1450. The standards of what constitute a workable local housing program were specifically expanded in 1954 to place an even greater emphasis upon prevention of deterioration and rehabilitation of substandard dwellings. Housing Act of 1954, 42 U.S.C. 1451(c).

can afford in order to live in uncrowded, decent, safe and sanitary dwellings.".[38] In addition,

> it is likely that Washington now is wasting -- that is, the city is physically depreciating -- much of its good housing stock by over-use and insufficient maintenance.[39]

In the District, 41% of the population -- 299,000 people -- lives in inadequate housing, and "more than 100,000 children are growing up in Washington now under one or more housing conditions which create psychological, social, and medical impairments, and make satisfactory home life difficult or a practical impossibility."[40]

38/ National Capital Planning Comm'n., Problems of Housing People in Washington, D.C., 53 (1966) (hereafter cited NCPC Report).

39/ Id. at 51.

40/ Id. at 6. The figure of 41% of the population living in inadequate housing was arrived at by the following calculations:

> 36,400 renter and homeowner households -- 15% of the total Washington population live in structurally substandard units or in structurally sound units that lack essential facilities;
> 21,800 renter and homeowner households -- 11% of Washington's total population live in overcrowded units which are structurally sound and have all essential facilities; and
> 45,100 renter households -- 16% of the total population live in uncrowded structurally sound housing units will all essential facilities. These households, however, pay more rent than they can afford. Id. at 5.

(Footnote cont'd)

The National Capital Planning Commission has reported that 17.9% of households which are rented in the District -- 31,700 households -- and 18.7% of persons living in rented households -- 85,500 persons -- live in housing units which are substandard.[41/]

The Department of Regional Planning of the Metropolitan Council of Governments found that in 1960 (the last year for which census statistics were available), 27,000 or 10.3% of the housing units in the District were

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(Footnote 40 cont'd)

Presumably the situations involved in the second and third categories have arisen because there is an insufficient number of low-rent units in the District which are structurally sound and which are within the financial reach of the resident population.

41/ NCPC Report at 45. This figure does not include persons living in overcrowded housing or housing which is financially beyond their means.

substandard and 31,100 or 11.9% of the households were overcrowded.[42] On the assumption that the rate of overcrowding and below-standard housing which existed in 1960 would continue in the future, the Council of Governments made a projection of the housing conditions in the District in the years 1968, 1985, and 2000. The results, set forth below, indicate that the number of overcrowded and substandard housing will increase significantly unless action is taken to prevent these conditions:[43]

I. Overcrowded Households (In Thousands)

1960	1968	1985	2000
31.1	46.9	56.3	60.2

42/ Metropolitan Washington Council of Governments, Housing Gap Quantification: A Methodology 34-35 (1968). The figures are based upon the 1960 Census of Population and Housing. Substandard housing, as used in the census reports, means those units which are deteriorating (i.e., units which need more repair than would be provided in the course of regular maintenance) and those which are dilapidated (i.e., units which do not provide safe and adequate housing). Overcrowded households are those with more than 1.01 persons per room. Id. at 32, 34.

The census figures on overcrowding and below-standard housing include home-owned dwellings as well as rental units. However, most of the units in the District which are inadequate are rental households. Only a small proportion of the figures represent home-owned dwellings. NCPC Report at 5.

43/ Id. at 34-35.

II. Substandard Housing Units (In Thousands)

1960	1968	1985	2000
27.0	37.3	38.6	41.3

The District of Columbia Court of Appeals ruling allowing landlords who are unwilling to put their substandard property into compliance with the Housing Regulations to close down rather than repair their units will exacerbate rather than ameliorate the housing problem for poor people. If the court's ruling, which is directed at all landlords in the District of Columbia, were implemented and all those who own below-standard housing chose to remove rather than repair their units, approximately 37,000 dwellings would be removed from the housing market.[44/]

The National Capital Planning Commission has found that the poor are already being shifted geographically within the city mainly by private market displacements.[45/] If the District of Columbia Court of Appeals decision in this case is allowed to stand not only will the rate of

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44/ Based on the Metropolitan Council of Government's estimate of substandard housing in 1968.

45/ NCPC Report at 51.

displacement of the poor by private landlords accelerate, but the ability of the poor to shift to other low-income housing will be severely limited by the accelerated rate of removal. "[B]oth physical and occupancy conditions of housing occupied by the poor are worsening,"[46/] and the DCCA's decision will only serve to aggravate an already deplorable situation.

As Mr. Justice Holmes noted, "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."[47/] The Congress, by authorizing, and the City Council, by enacting, the Housing Regulations for the District have recognized that decent, safe and sanitary housing is a basic necessity of a city. Both Congress and the Commissioners have also recognized that a degree of public control is necessary to ensure an adequate supply of such housing for the residents of the District of Columbia.

46/ NCPC Report, at 51.

47/ Block v. Hirsh, 256 U.S. 135, 156 (1921).

The gravity of the housing problem in the District of Columbia and the effect which the decision appealed from will have upon the housing situation requires that this Court reverse the DCCA's directive allowing unwilling landlords to remove rather than repair their substandard housing. The Court should rule that mere unwillingness to repair, as in the instant case, is not sufficient justification for the removal of property from the rental market, and that where a landlord asserts legitimate business considerations for the removal of the property, the burden of proving that the removal is justifiable be placed upon the landlord, for it is he who is most familiar with his own motivations and business considerations.

Appellant stresses that she is not urging the court to interfere with a man's dominion over his own home. At issue is rental property -- property which is operated by the landlord for business purposes.[48/] Nor is she asking

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48/ Appellee in the instant case is a corporation, licensed by the District of Columbia to operate a real estate business. The dwelling involved in the case is merely one of many hundreds of units owned and rented by appellee. See note 15 supra.

the Court to interfere in the absence of legislative action. All that is requested is the implementation of the Housing Regulations of the District of Columbia.

Furthermore, it is not suggested that a landlord may never close down one of his units or never go out of business. Appellant's position is only that he may not do so when his primary motivation is unwillingness to comply with the housing regulations.

CONCLUSION

For the reasons set forth above, the decision of the trial court should be reversed and the case remanded for an appropriate disposition.

Respectfully submitted,

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