

LANDLORD PROTECTIVE ORDERS—A LACK OF GUIDELINES FOR APPELLATE USE.

I. INTRODUCTION

Protective orders have been in use for many years, but only recently have they been utilized to protect the landlord during litigation with tenants.¹ This judicial innovation developed when the Commissioners of the District of Columbia attempted to correct the deplorable housing situation by passing stringent housing regulations.² These housing regulations were passed with the full sanction of the Congress and as such reflect the sentiments of Congress toward the housing situation in the District of Columbia.³

Violations of these housing regulations by the landlord presented a tenant with a complete defense against dispossession for non-

1. A landlord protective order is a procedural device requiring a tenant to pay monies, representing rent into the court, where the tenant is attempting to assert a defense or pursue an appeal against a suit for possession based on non-payment of rent. A review of the WESTS 7TH DECENNIAL DIGEST under "Deposits in Court" will show the many ways deposits in court have been used as a form of protective order. The earliest reported case utilizing a landlord protective order was *Edwards v. Habib*, 366 F.2d 628 (D.C. Cir. 1965), (hereinafter cited as *Habib*). In *Habib*, the tenant was required to pay rent while appealing a dispossession judgment based on notice to quit. His appeal claimed that the notice to quit was in retaliation to his reporting violations of the housing regulations. See also, note 21, *infra*.

2. The Commissioners of the District of Columbia hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted, and that there are, in addition, other such buildings and areas within said District which are deteriorating and are in danger of becoming slums or otherwise blighted unless action is taken to prevent their further deterioration and decline.

The Commissioners further find and declare that the aforesaid conditions, where they exist, and other conditions which contribute to or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare and morals of the community and its inhabitants.

Housing Regulations of the District of Columbia § 2101 (1956); see also, *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), for a discussion of the housing conditions existing in the District of Columbia.

3. The Commissioners of the District of Columbia are authorized and directed to make and enforce such building regulations for the said District as they may deem advisable.

Such rules and regulations made as above provided shall have the same force and effect within the District of Columbia as if enacted by Congress. 1 D.C. CODE § 228 (1967).

payment of rent.⁴ The availability of this type of defense enables a devious tenant to unjustly avoid payment of rent, thus causing a landlord irreparable financial damage. By requesting a jury trial a tenant could cause deferment of rental payments for several months, while the cost to a tenant would be nil if he were allowed to proceed *in forma pauperis*. Therefore, landlord protective orders developed to protect the landlord from financial loss during protracted litigation where the tenant asserted a frivolous defense. Unfortunately, misuse of these orders could potentially circumvent the rights of the honest tenant as conferred by the housing regulations. Due to their recent development, there have been only two decisions which have dealt with these orders and prerequisites for their use: *Bell v. Tsintolas Realty Co.*,⁵ which dealt with a pre-trial matter, and *Cooks v. Fowler*,⁶ which dealt with an appellate matter. The purpose of this comment will be to examine the more recent decision in *Cooks* as it relates to *Bell*, and thereby evaluate the current status of the law.

II. BELL V. TSINTOLAS REALTY Co.⁷

Bell concerned a suit for possession based on non-payment of rent, which the tenant answered, asserting substantial housing code violations as a defense. At the landlord's request, the court issued an order requiring the tenant to pay rent into its registry before proceeding further. The court refused to stay the order, and the tenant then requested leave to appeal and proceed *in forma pauperis*. The request was granted on the condition that rent due was deposited in court, in addition to future rent as it came due.

On appeal, the District of Columbia Court of Appeals granted a stay of the original order, and yet deleted only the back rent requirements from the order granting leave to proceed *in forma pauperis*. The tenant was thus given the option of being granted a

4. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Mun. Ct. App. 1968), held that a defense may be based on unsanitary and unsafe conditions in violation of the regulations if known by the landlord at the inception of the lease; *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), established a warranty of habitability measured by the standards set out in the regulations.

5. 430 F.2d 474 (D.C. Cir. 1970), (hereinafter cited as *Bell*).

6. 437 F.2d 669 (D.C. Cir. 1970), (hereinafter cited as *Cooks*).

7. *Bell*, *supra* note 5.

stay of the order if he would bear the cost of the appeal or complying with the order if choosing to appeal *in forma pauperis*. The district court decision was subsequently appealed by the tenant.

The United States Court of Appeals addressed itself to determining “[W]hether and under what circumstances the Landlord and Tenant Branch of the Court of General Sessions may issue orders of the type designed to protect landlords during the period of litigation.”⁸ The court of appeals was concerned that this type of procedure, being in effect a prejudgment security deposit, was foreign to our courts.⁹ The court also felt that the effect of permitting this type of order, involving a tenant’s attempt to proceed *in forma pauperis*, would be to restrict the indigent’s access to, and participation in, the judicial process.¹⁰ This was contra to recent decisions which attempted to eliminate the distinction between wealthy and indigent litigants.¹¹ The court was also wary of authorizing a rent collection procedure in addition to the remedies available under the District of Columbia Code.¹² This was based on a concern that if protective orders were permitted, they would upset the precarious balance of judicial tactics between the landlord and tenant, and tip the scale in favor of the landlord.¹³ However, the court was not blind to the equities in favor of allowing such orders; notably, the considerable time that can elapse if a jury is requested, or if the defendant pursues an unmeritorious defense.¹⁴

After consideration of these interests, the court established strict guidelines for the use of landlord protective orders and remanded the case.¹⁵ These guidelines allowed protective orders:

[O]nly when the tenant has either asked for a jury trial or asserted a defense based on violations of the housing code, and only upon motion of the landlord and after notice and opportunity for oral ar-

8. *Bell*, *supra* note 5, at 479.

9. Certainly such a protective order represents a noticeable break with the ordinary processes of civil litigation, in which, as a general rule, the plaintiff has no advance assurance of the solvency of the defendant. *Id.*

10. *Id.*

11. *Harris v. Harris*, 424 F.2d 806 (D.C. Cir. 1970), held that an indigent did not have to be absolutely destitute to enjoy the benefit of proceeding *in forma pauperis*; *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970), held that an indigent must be furnished a free transcript in all civil cases where necessary for resolution of important questions.

12. *Bell*, *supra* note 5, at 480-81.

13. *Id.* at 481-82; *see also*, *Dorfmann v. Boozer*, 414 F.2d 1168, 1172 (D.C. Cir. 1970), for a discussion of the remedies available to the landlord in the District of Columbia.

14. *Bell*, *supra* note 5, at 481-82.

15. *Id.* at 483-84.

gument by both parties [T]he protective order will be adjudged independently of the right to a jury trial and the right to proceed *in forma pauperis*: it may issue only when the landlord has demonstrated an obvious need for such protection.

. . . .

Even if the landlord has adequately demonstrated his need for a protective order, the trial judge must compare the need with the apparent merits of the defense based on housing code violations.¹⁶

These requirements clearly restrict the landlord's ability to obtain a protective order and therefore must be viewed as an attempt by the court to protect the rights of the tenant. The court further enhanced the tenant's position by holding that even though grounds might exist for permitting an order, the order should be less than full rent if the tenant made a strong showing that the dwelling was in violation of the housing regulations.¹⁷

The first reported decision to apply the *Bell* criteria in a pre-trial situation was *Blanks v. Fowler*.¹⁸ The tenant is currently appealing the court's decision to permit a protective order on the contention that the court improperly allocated the burden of proof. The precise question is whether the trial court erred in holding that the burden of proof rests on the petitioner to explain her past failures to pay rent, and not upon the landlord to show a need for a pre-trial protection. Also, the ability of the tenant to pay rent accruing to the end of the trial in the event the tenant lost, was not considered, and thus was inconsistent with the *Bell* decision.

In the final analysis, *Bell* must be considered a sound decision which took into account the various equities of both the landlord and tenant, and yet was consistent with the general policy considerations regarding the elimination of substandard housing.¹⁹

16. *Id.*

17. *Id.* at 484.

18. 437 F.2d 677 (D.C. Cir. 1971), (hereinafter cited as *Blanks*).

19. Both Congress and the Supreme Court have held that elimination of slums is of urgent national interest:

The need to maintain basic, minimal standards of housing, to prevent the spread of disease, and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government. *Frank v. Maryland*, 359 U.S. 360, 371 (1969).

The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development

Unfortunately, when the same court treated the subject in the appellate process, it did not produce such clear cut guidelines.

III. COOKS V. FOWLER²⁰

In *Cooks*, as in *Bell*, the landlord instituted an action for recovery of possession based on non-payment of rent. The tenant claimed a defense based on violations of the housing code. The landlord then issued a notice to quit which the tenant asserted was retaliatory.²¹ Even though the tenant objected, the two actions were consolidated. Although the tenant prevailed on the violations of the housing regulations, the landlord was allowed possession based on the notice to quit. Subsequently, the District of Columbia Court of Appeals permitted a stay of eviction pending appeal on the retaliatory issue. However, this stay was conditioned upon the tenant's payment into court of monthly sums equal to the rent that would accrue. The tenant refused to comply and, when the stay was vacated, he appealed, requesting another stay of eviction.

Although this appeal was based more on a reduction in the amount of the protective order under the *Bell* criteria than on an elimination of the order, the United States Court of Appeals addressed itself to "[D]efining the true role of the protective order in the appellate process."²² The court recognized that *Bell* was the only real treatment of this subject, but distinguished the *Bell* decision on the grounds that it dealt primarily with a pre-trial situation.²³ Arguing in favor of permitting the order, the court felt it was proper at the appellate level in view of its similarity to a *supersedeas* bond.²⁴ The court relied on *Bell* to support the contention that it was the duty of the court "[T]o 'fashion an equitable remedy' . . . 'to avoid placing one party at a severe disadvantage during the period of litigation.'"²⁵ It was also held that the burden of an order would require the tenant to do little more than that

sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family. 42 U.S.C. § 1441 (1964).

20. *Cooks*, *supra* note 6.

21. *Edwards v. Habib*, 397 F.2d 687, 699 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), established that: "[W]hile landlord may evict for any or no reason at all, he was not free to evict tenant in retaliation for report of housing code violations to the authorities."

22. *Cooks*, *supra* note 6, at 673.

23. *Id.* at 674.

24. *Id.*

25. *Id.*

to which he had voluntarily agreed when he entered the lease.²⁶ Further, the proven housing regulation violations did not preclude an order, but no reason was offered in support of this contention.²⁷ The court also relied on its earlier decision in *Edwards v. Habib* to support imposition of the order.²⁸ However, it agreed with the *Bell* rationale by holding that if a protective order was issued, and housing code violations existed, it should be something less than the full rental value of the property. The parties were then directed to submit supplemental memoranda to determine this amount.²⁹

It must be noted that in covering the argument in favor of a protective order, the court did not consider any of the reasons why it should not have been permitted. In addition, this decision is confusing, for on one hand, the court addressed itself to "[D]efining the true role of the protective order in the appellate process",³⁰ but on the other stated:

We do not now decide inflexibly for the future just when and precisely under what conditions protective orders pending appeal are proper. The issues developing in that connection undoubtedly will loom large in the decision of the appeal on the merits, an area into which we, as a motions panel, do not unnecessarily intrude. Rather, we confine our treatment to the propriety of some provisional arrangement for this case until the merits panel can formulate the standards to govern protective orders for landlords while their tenants are pursuing appeals. (footnote omitted)³¹

The only substantive rule that may thus be gleaned from the opinion is that protective orders will be allowed in the appellate process as long as they are consistent with the *Bell* criteria for determining amount. By leaving the establishment of rules to the merits panel, it cannot be determined to what degree protective orders will be allowed in the future. They may be permitted with strict guidelines, as in the case of pre-trial orders under *Bell*, or permissively, as in *Cooks*.

26. *Id.*

27. *Id.* at 675.

28. 366 F.2d 628 (D.C. Cir. 1965); see also, note 1 *supra*.

29. The court subsequently established this amount as \$48.33, *Cooks v. Fowler*, No. 24,546 (D.C. Cir. Jan. 12, 1971).

30. *Cooks*, *supra* note 22.

31. *Cooks*, *supra* note 6, at 675. The court utilized the same argument in hearing a request for summary reversal of the protective order in *Blanks*. It approved the amount of the protective order, which the lower court had made less than full rent, but refused to rule on whether it was right or wrong.

However, the question still remains; why was the court so hesitant to formulate the rules for the use of protective orders in the appellate process? Three reasons may be postulated in answer to this query. One, the court was naturally hesitant to reverse itself and overruled its earlier decision in *Habib*. Two, the establishment of any rule not requiring some form of *supersedeas* device to stay execution is a novel departure and the court was reluctant to pursue this course without serious deliberation. Three, to have approved protective orders at the appellate level would have ignored the policy consideration that elimination of slums and protection of the rights of indigents are of the utmost importance.

In rendering the decision in *Cooks*, the court only did what it was asked. It reviewed the amount of the protective order in light of *Bell* and ruled accordingly. Its failure to achieve its avowed purpose, although confusing, is of little consequence, as the door was at least left open for the merit panel to establish rules for the application of landlord protective orders in the appellate process.

IV. FACTORS BEARING ON APPELLATE LEVEL PROTECTIVE ORDERS

When, and if, the merit panel undertakes to establish these rules, it will have a challenging task. In their formulation, the court must recognize the many factors ignored in *Cooks*, which argue in favor of requiring strict guidelines for protective orders. This is best accomplished by examination of those aspects of *Cooks* which argued against the allowance of the order in that case, but were not explored by that court.

Even though *Bell* dealt with a pre-trial question, the relative position of the parties in *Cooks* were the same. For this reason, those pronouncements of *Bell* which attempted to weigh the equities of both parties are pertinent.³² Allowing the protective order in light of the landlord's proven violations of the housing regulations served only to reward his bad faith and evasion of the law. This takes on even greater significance in view of the fact that the landlord did not intend to correct the conditions complained of, but instead was considering removal of the property from the rental market.³³ Also, the appeal on the retaliatory issue is not based on a jury's findings that no retaliatory motive existed, but on the judge's refusal to submit this question to the jury. Thus,

32. See notes 9-13, *supra*.

33. *Cooks*, *supra* note 6, at 674 n.25.

the potential merit of the appeal was not even considered. In further disregard of the landlord's breach of duty, the court stated that a protective order would avoid placing one party at a disadvantage, while requiring the others to do no more than agreed by contract.³⁴ If anyone was placed at a disadvantage, it was Mrs. Cooks, for she had never received what was bargained for. The only decision relied on, *Habib*, involved an appeal claiming retaliation, and was not relevant to the situation in *Cooks*.³⁵ In *Habib*, there was no allegation or proven violation of the housing code, but merely a contention by the tenant that the notice to quit was retaliatory.³⁶ In failing to consider these factors, the court ignored the equitable maxim that "[H]e who seeks equity must do equity"³⁷

Simply because a *supersedeas* bond is somewhat analogous to a protective order, is no reason for the automatic approval of such orders. A *supersedeas* bond is equitable in nature and should be required only at the discretion of the court.³⁸

Showing the deficiencies of *Cooks* is easily accomplished; it requires little more than the balancing of a scale. What is crucial are the policy considerations of eliminating substandard housing and protecting the rights of the indigent tenant.³⁹ This should cause the balance to fall in favor of imposing strict rules relating to protective orders in the appellate process.

Therefore, in the formulation of rules, guidelines should be established similar to those in *Bell*. Guidelines requiring that the landlord must not only establish a need for the order, but which will also require the court to consider the merit of the appeal, the

34. See note 25, *supra*.

35. See note 1, *supra*.

36. Had the court not allowed the protective order, its decision would not have overruled *Habib* sub silentio due to the factual dissimilarity of the cases. Thus, *Habib* should be distinguished on the facts.

37. *Jacklich v. Baer*, 57 Cal. App. 2d 684, 693, 135 P.2d 179, 184 (1943), citing *J. PROMEROY'S, EQUITY JURISPRUDENCE* § 400 (5th ed. 1941).

38. Court of General Sessions Rule 73 (a):

SUPERSEDEAS BOND. Whenever an appellant desires a stay on appeal he may, within 10 days after the date of entry in the civil docket of the judgment or order appealed from, present to the court for its approval a supersedeas bond, which shall have such surety or sureties as the court requires. (emphasis added) [hereinafter cited as Rule 73 (a)].

39. See note 19, *supra*.

degree of housing regulation violations, the landlord's good or bad faith, and the economic status of the appellant.

If an indigent asserts substantial housing code violations, and a retaliatory question is raised, the court must not lose sight of the fact that this litigant is the very person that should be protected by the housing regulations. If the indigent, in good faith, is pursuing a meritorious appeal based on substantial violations of the code (either proven or alleged), then a protective order should not be issued. Had these criteria been applied to *Cooks*, the court would not have allowed a protective order, and a more equitable disposition would have resulted.

V. CONCLUSION

Although the establishment of flexible rules concerning protective orders will not require legislation or reversal of existing judicial precedents, it will require a change in the attitudes of the judges. Specifically, Rule 73 (a) must be applied flexibly in requiring a *supersedeas* bond, and not strictly, as has been done in the past.⁴⁰

Wholesale abandonment of *supersedeas* bonds or all protective orders in landlord-tenant matters is not advocated, for that would clearly destroy the rights of the landlord. What is required, in a situation where housing code violations are proven and a retaliatory motive is in question, is a shifting of the burden of proof to the landlord to show the need for such an order.

It may very well be that to deny a successful litigant any assurance of protection from potential damage during appeal is a harsh rule. However, once the accusation has been raised, even upon appeal, that the landlord was leasing dwellings which were below the required norms, the burden of proof should be upon the landlord to prove his need for protection.

Every effort must be made and every opportunity utilized to protect the indigent tenant from the unscrupulous landlord who would take advantage of him by providing substandard housing.⁴¹

40. To a degree Mrs. Cooks' approach in attacking the order acknowledged the strict application of Rule 73 (a). This may be surmised from the fact that Mrs. Cooks sought to have the order reduced rather than set aside. Also, because making the application of Rule 73 (a) more flexible is a significant undertaking, it should be considered the main reason behind the court's reluctance to formulate definite rules in either *Cooks*, or *Blanks*.

41. Mrs. Cooks had contracted to pay \$72.50 per month for the apartment in which to house herself and her three children. There can be no question that the condition of the dwelling must have been deplorable for the court to see fit to lower the payments to only \$48.33 per month.

Conversely, the leasing of substandard housing must be made as unrewarding and risky as possible in an effort to eradicate this type of blight. To do anything less would fall short of our national goals.⁴²

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42. See note 19, *supra*.