DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,983

In re: 600 9th Street, N.E.

Ward Five (5)

DARNISE DAVIS
Tenant/Appellant

v.

DONALD R. MADDEN
Housing Provider/Appellee

DECISION AND ORDER

March 28, 2002

YOUNG, COMMISSIONER. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991) govern the proceedings.

I. PROCEDURAL HISTORY

The housing accommodation, located at 600 9th Street, N.E., is a single family home owned by the housing provider/appellee, Donald R. Madden. On May 25, 2000, Darnise Davis, the tenant/appellant, filed Tenant Petition (TP) 24,983 with the Rental Accommodations and Conversion Division (RACD), DCRA. In her petition the tenant asserted: 1) A rent increase was taken while her unit was not in substantial compliance with

the D.C. Housing Regulations; 2) the housing accommodation was not properly registered with RACD; 3) services and facilities provided in connection with her rental unit were permanently eliminated; 4) services and facilities provided in connection with her rental unit were substantially reduced; and 5) retaliatory action was directed against her by the housing provider for exercising her rights in violation of the Act.

Hearing Examiner Terry Michael Banks presided at the Office of Adjudication (OAD) hearing on May 30, 2001. On July 27, 2001, OAD issued the decision and order in this case, and on August 1, 2001, OAD issued an amended decision and order, which made corrections to the caption but not to the text of the decision. Also on August 1, 2001, the tenant filed a notice of appeal from the amended decision in the Commission. On September 26, 2001, the housing provider, filed a Motion to Dismiss Appeal, which the Commission denied by order dated November 15, 2001.[1]

In his decision and order, the hearing examiner made the following findings of fact:

. . .

2. In April 1999, Petitioner caused the housing accommodation to be inspected by officials of the District government. The officials issued a Housing Deficiency Notice listing forty-four (44) separate violations, dated April 16, 1999.

3. In early 2000, Respondent notified Petitioner by letter that he intended to raise her rent to three thousand six hundred dollars ($3,600.00) per month. The proposed rent increase was never implemented.

4. The subject housing accommodation was not registered with the Rent Administrator [sic] when Respondent proposed to increase Petitioner's rent in early 2000.

5. Between April 1999 and May 26, 2000, Respondent directed contractors to effect repairs in each of the problem areas reflected in the Housing Deficiency Notice dated April 16, 1999.

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[1] See Davis v. Madden, TP 24,983 (RHC Nov. 15, 2001).

...

7. At the time the petition was filed, the housing accommodation did not have excessive or prolonged violations of the housing regulations affecting Petitioner's health, safety, or security, or the habitability of the housing accommodation. As of the date of the hearing in this proceeding, May 30, 2001, the housing accommodation did not have excessive or prolonged violations of the housing regulations affecting Petitioner's health, safety, or security, or the habitability of the housing accommodation.

8. Petitioner did not establish that Respondent failed to correct the housing deficiencies listed on the Housing deficiency [sic] Notice of April 16, 1999 once he was put on notice of the deficiencies.

9. Petitioner has failed to establish that that [sic] any of the alleged deficiencies adversely affected her health, welfare, or safety.

10. Respondent first registered the housing accommodation with the Rent Administrator on June 2, 2000. Respondent did not claim an exemption under D.C. Code Section 45-2515(a)(3).

11. Respondent's proposal to raise Petitioner's rent in early 2000 was made in response to an appraisal of the fair market rent by Long & Foster [sic] rather than in retaliation for the housing inspection requested by Petitioner more than eight months earlier.

Davis v. Madden, TP 24,983 (OAD July 27, 2001) at 3-4.

In his conclusions of law, the hearing examiner stated:

1. In early 2000, when Respondent informed Petitioner that he intended to raise her rent, Respondent was not entitled to raise Petitioner's rent, because the housing accommodation was not properly registered with DCRA.

2. Petitioner has not met her burden of proving services or facilities provided in connection with the housing accommodation have been substantially reduced or permanently eliminated. Therefore, Petitioner is not entitled to an adjustment of her rent.

3. Respondent's proposal to raise Petitioner's rent was not made in retaliation to Petitioner's solicitation of a housing inspection.

Id. at 8. (footnotes omitted).

II. ISSUES ON APPEAL

On appeal, the tenant stated: "Safety, welfare [and] health was an issue when appellant went months with no heat, mildew in garage from leaking over a year. Leaking in office (ceiling literally down) for over a year. Appellee has [and] continue[s] to harass Appellant because the Housing Accomadation [sic] was inspected." Tenant's Notice of Appeal at 1. The tenant asserted the hearing examiner erred in his findings of fact that at the time the petition was filed, the housing accommodation did not have excessive or prolonged violations of the housing code.

III. DISCUSSION OF THE ISSUES

A. Whether the hearing examiner erred in finding the tenant's unit did not have excessive or prolonged violations of the housing regulations affecting the health, safety or habitability of the housing accommodation.

The tenant argued the hearing examiner erred when he determined that her safety, welfare or the habitability of the housing accommodation was at issue or that her unit did not have prolonged or excessive violations of the housing code. The hearing examiner stated in his decision:

> At the time the petition was filed, the housing accommodation did not have excessive or prolonged violations of the housing regulations affecting Petitioner's health, safety, or security, or the habitability of the housing accommodation. As of the date of the hearing in this proceeding, May 30, 2001, the housing accommodation did not have excessive or prolonged violations of the housing regulations affecting Petitioner's health, safety, or security, or the habitability of the housing accommodation. (emphasis added).

Davis v. Madden, TP 24,983 (OAD July 27, 2001) at 4.

The hearing examiner concluded in his decision that the housing code violations, which were the basis of the tenant's assertion that she suffered a reduction of services and facilities, did not affect her "health, safety, security, or the habitability of the housing accommodation." The Act,

D.C. OFFICIAL CODE § 42-3502.10(a)(1) (2001),[2] provides four different and independent factors which may be used to justify the approval of a capital improvement petition. The four factors are: (1) to protect health, safety, or security; (2) to enhance health, safety, or security; (3) to protect habitability; and (4) to enhance habitability. See Fort Chaplin Park Assocs. v. District of Columbia Rental Hous. Comm'n, 649 A.2d 1076 (D.C. 1994); Quebec House Assocs. v. Tenants of Quebec House, CI 20,683 (RHC May 13, 1999); 1841 Columbia Rd. Tenants Ass'n. v. 1841 Columbia Rd. Ltd. P'ship, CI 20,082 (RHC Dec. 23, 1987). The applicable provision of the Act, D.C. OFFICIAL CODE § 42-3502.11 (2001), provides:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

The Commission, in Washington Realty Co. v. 3030 30th St. Tenant Ass'n., TP 20,749 (RHC Jan. 30, 1991), quoting Interstate General Corp. v. District of Columbia Rental Hous. Comm'n, 501 A.2d 1261, 1263 (D.C. 1985) stated: "The plain meaning of the statute is clear from its language. … It [the statute] requires only that there be a finding by the Rent Administrator that there has been a substantial change in the services or facilities provided by the landlord." The hearing examiner's determination based upon whether the reduction of services affected the tenant's health, safety, or security, or the habitability of the housing accommodation was not in accordance with the decisions of the Commission or Court.

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[2] The applicable section of the Act, D.C. OFFICIAL CODE § 42-3502.10(a)(1) (2001) provides:

> (a) On petition of the housing provider, the Rent Administrator may approve a rent adjustment to cover the cost of capital improvements to a housing accommodation if:
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> (1) The improvement would protect or enhance the health, safety, and security of the tenants or the habitability of the housing accommodation.

The hearing examiner's application of the standard used to justify the approval of a capital ıprovement petition in his adjudication of a tenant petition claiming a reduction of services and ıcilities was error. However, in the instant case, the Commission determines the hearing xaminer's error was harmless error.[3]

In Ford v. Dudley, TP 23,973 (RHC June 3, 1999), the Commission set forth the burden of he tenant when asserting a claim of reduction or elimination of services under the Act.[4] The Commission stated:

> [F]or a tenant to successfully pursue a claim of reduction or elimination of services, a three-prong test must be satisfied. First, the tenant must provide evidence of a reduction or elimination of services, and the fact-finder must find that the housing provider eliminated or substantially reduced a service or services at the tenant's rental unit. Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1988). Second, the tenant must establish the duration of the reduction in services, and present evidence to support his allegations. Daro Realty, Inc. v. 1600 16th St. Tenants Ass'n., TP 4,637 (RHC Oct. 20, 1988) cited in Cobb v. Charles E. Smith Mgmt. Co., TP 23,889 (RHC July 21, 1998). Third, the tenant must show that the housing provider had knowledge of the alleged reduction of services. Gelman Co. v. Jolly, TP 21,451 (RHC Oct. 25, 1990).

Id. at 5-6 (footnote omitted).

In his decision the hearing examiner recounted the evidence and testimony presented by the parties at the OAD hearing. The hearing examiner stated:

> Respondent also testified that Petitioner intentionally frustrated his attempts to correct the violations by (1) refusing to allow his workmen onto the premises, (2) verbally

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[3] BLACK'S LAW DICTIONARY 646 (5th ed. 1979), defines harmless error as:

> An error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case .... Harmless error is not a ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless such refusal appears to the court inconsistent with substantial justice. Quoted in Ford v. Dudley, TP 23,973 (RHC June 3, 1999) at 9.

[4] The Act, D.C. OFFICIAL CODE § 42-3501.03(27)(2001), provides: "Related services means services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance...."

> abusing his workmen to such [a]n extent that two of them resigned, (3) and [sic] changing the locks to the housing accommodation without his knowledge or permission.

Id. at 6. The hearing examiner, in his decision, gave greater weight to the evidence provided by the housing provider. The housing provider testified and the hearing examiner accepted that in a related landlord and tenant proceeding in the Superior Court of the District of Columbia, the housing provider was not compelled to perform further painting, because materials and equipment stored in the space by the tenant prevented the housing provider's workmen from accessing the housing accommodation to do the repairs cited by the tenant in her petition.

The Commission has previously held that when a tenant alleges a reduction in services and facilities, he or she has an obligation to notify the housing provider in a timely manner. In addition, a tenant also has an obligation to provide the housing provider reasonable access to the housing accommodation to perform the necessary repairs and to otherwise cooperate with the housing provider in having the repairs performed. Offong v. American Security Bank, TP 21,087 (RHC Jan. 11, 1990); Hagner Mgmt. Corp. v. Lewis, TP 10,303 (RHC May 26, 1983). The hearing examiner's decision and order further stated:

> Petitioner has failed to meet her burden of proving a substantial reduction or termination of services. While petitioner testified that numerous violations existed by the time of the Housing inspection on April 16, 1999, Respondent was equally emphatic in his insistence that each of the violations was corrected once he was put on notice. Respondent also offered credible testimony that his contractors' efforts to enter the premises to effect repairs was frustrated by Petitioner's refusal to provide unfettered access. .... Although Petitioner testified in this proceeding that Respondent had not corrected 28 of the 44 violations, in the Superior Court proceeding on May 26, 2000, more tha[n] a year ago, she admitted that Respondent had corrected virtually all of the violations.

Davis v. Madden, TP 24,983 (OAD July 27, 2001) at 7. The hearing examiner held that the tenant failed to meet her burden of proving services and facilities provided in connection with the housing

accommodation have been substantially reduced or permanently eliminated and that she did not establish the facts essential to her claim.

The Commission concludes that there was substantial evidence in the record to support the hearing examiner's decision. Although the tenant testified regarding housing code violations in the housing accommodation, she failed to provide evidence regarding the relevant dates and times of the reductions in services or the length of time that the services were reduced, which are essential elements of a claim of reduction in services. See Russell v. Smithy Braedon Property Co., TP 23,361 (RHC July 20, 1995). Accordingly, the decision of the hearing examiner on this issue is affirmed.

B. Whether the hearing examiner erred in failing to find that the housing provider retaliated against the tenant for causing the housing accommodation to be inspected.

The tenant asserted that the housing provider continued to harass her as a result of her request for an inspection of the housing accommodation.

In his decision and order the hearing examiner found that no retaliation occurred. The hearing examiner found as a finding of fact: "Respondent's proposal to raise Petitioner's rent in early 2000 was made in response to an appraisal of the fair market rent by Long & Foster [sic] rather than in retaliation for the housing inspection requested by Petitioner more than eight months earlier." Davis v. Madden, TP 24,983 (OAD July 27, 2001) at 4, and cited above at 3.

The hearing examiner summarized the evidence and testimony regarding the issue of retaliation as follows:

> Petitioner alleges that Respondent retaliated against her when she had the housing accommodation inspected, in violation of D.C. Code Section 45-2552, by proposing to raise her rent from $1700 to $3600 per month. Respondent disputes this characterization of the chain of events. He testified that Petitioner originally

> approached him about buying the house, a renovated church. Respondent eventually agreed to lease it to Petitioner in January 1998, with an option to buy, if she would lease it "as is" and effect all necessary repairs. In April of 1999, Petitioner requested the housing inspection. Respondent testified that he proposed his rent increase in early in 2000 after an appraisal by Long & Foster informed Respondent that the fair market rent was $3900. The proposed rent increase has never been implemented. By early 2000, Respondent also had become convinced that Petitioner was not able to arrange the necessary financing to purchase the house. Respondent placed the house on the market and received a contract from another individual. According to Respondent, Petitioner failed to submit a matching offer and failed to meet two extensions of the deadline to submit such an offer. The Hearing Examiner finds that Respondent's explanation of the chain of events leading to his decision to propose raising Petitioner's rent credibly refutes Petitioner's contention that it was done in retaliation to her solicitation of a housing inspection one year earlier.

Davis v. Madden, TP 24,983 (OAD July 27, 2001) at 7.[5] The hearing examiner in his conclusion of law stated: "Respondent's proposal to raise Petitioner's rent was not made in retaliation to Petitioner's solicitation of a housing inspection." Id. Accordingly, the hearing examiner found that the housing provider had met his burden and rebutted the presumption of retaliation by clear and convincing evidence.

The Act, D.C. OFFICIAL CODE § 42-3505.02(b),[6] provides when determining if a housing provider has taken retaliatory action, "the trier of fact shall presume retaliatory

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[5] Contrary to the hearing examiner's summary of the evidence, the record contains a dated, but unstamped Tenant Notice of Increase of General Applicability dated June 1, 1999, increasing the rent for the tenant's unit from $1,700 to $3,600, effective August 1, 1999, within six (6) months of the tenant's request that the housing accommodation inspected, which she did in April 1999.

[6] D.C. OFFICIAL CODE § 42-3505.02(b), provides in part:

> In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter a judgment in the tenant's favor unless the housing provider comes forward with clear convincing evidence to rebut this presumption if within the six (6) months preceding the housing provider's action, the tenant:
>
> (1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;
>
> (2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations

action has been taken, if within six months preceding the retaliatory action," the tenant made a request for repairs or contacted D.C. officials regarding the housing provider's actions. It also provides that the hearing examiner "shall enter a judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption." Id. (emphasis added). In the instant case the hearing examiner determined, based on the testimony at the hearing, that the housing provider rebutted the presumption of retaliation by presenting clear and convincing evidence regarding the intent of his action to increase the tenant's rent. The hearing examiner based his conclusion on the credibility of the testimony of the housing provider that he notified the tenant of an increase in the rent for the housing accommodation based solely on a market value rent assessment conducted by Long and Foster. The Commission has previously held that findings of credibility by the hearing examiner will be given deference by the Commission, and will not be disturbed absent evidence in the record to the contrary. Gray v. Davis, TP 23,081 (RHC Dec. 7, 1993); See also Eilers v. Bureau of Motor Vehicles Servs., 583 A.2d 677, 684 (D.C. 1990). Accordingly, the decision of the hearing examiner on this issue is affirmed.

IV. CONCLUSION

The Commission concludes that the tenant failed to present substantial evidence in

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in the rental unit the tenant occupies or pertaining to the housing accommodation in which the unit is located;

(3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulation;

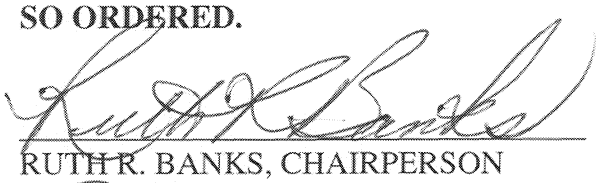
(4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;

(5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or

(6) Brought legal action against the housing provider.

the record to support her allegations that the housing provider reduced the services and facilities associated with the housing accommodation and that the housing provider retaliated against her. Therefore, the decision of the hearing examiner is affirmed.

SO ORDERED.



RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

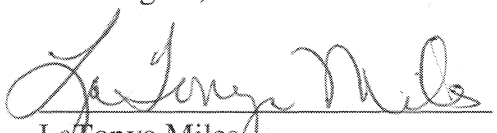
JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DECISION and ORDER** in TP 24,983 was mailed by priority mail with delivery confirmation this **28th day of March, 2002** to:

Charles M. James III, Esq.
P.O. Box 1238
Cheverly, MD 20785

Andrew N. Cook, Esq.
Bell, Boyd & Lloyd, PLLC
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036-5610



LaTonya Miles
Contact Representative