

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 26,119

In re: 1825 18th Street, N.W., Unit F

Ward Two (2)

ERIN MARIE DEY
Tenant/Appellant

v.

L. J. DEVELOPMENT, INC.
Housing Provider/Appellee

DECISION AND ORDER

August 29, 2003

BANKS, CHAIRPERSON. This case is on appeal to the District of Columbia Rental Housing Commission from a decision and order issued by the Rent Administrator. The applicable provisions of the Rental Housing Act of 1985 (Act), 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 (DCMR), 14 DCMR §§ 3800-4399 (1991) govern the proceedings.

I. THE PROCEDURES

On October 13, 2000, Erin Marie Dey, the Tenant, filed Tenant Petition (TP) 26,119, alleging: 1) a rent increase larger than allowed by the Act, 2) a lack of proper 30-day notice of rent increase, 3) the Housing Provider failed to file the proper rent increase form with the RACD, 4) the rent charged the Tenant exceeded the rent ceiling, 5) the rent ceiling on file with the RACD was improper, 6) the housing accommodation was not properly registered with RACD, 7) services and facilities were substantially reduced, and

8) services and facilities set forth in a Voluntary Agreement were not provided. In addition, the Tenant wrote on the petition that she received notice of a rent increase by telephone and that the license for the corporate owner of the housing accommodation was revoked. The petition was initially scheduled for hearing on January 8, 2001, however, Hearing Examiner Gerald J. Roper granted the Tenant's motion for a continuance. The hearing was rescheduled and held on February 5, 2001. Counsel for L. J. Development, Inc., Housing Provider, made an oral motion at the hearing for a continuance, because her client, the owner of the company, was not physically in the District of Columbia and counsel also requested that her client appear by telephone. Those motions were denied.

In addition, at the conclusion of the hearing, the hearing examiner ruled that the hearing record would remain open until February 12, 2001 for the Housing Provider's counsel to submit additional evidence, which was filed on that day. The Housing Provider submitted several exhibits consisting of: 1) an affidavit of Joseph Mahoney, 2) a copy of an e-mail, 3) a certificate of occupancy, and 4) corporation certificate of authority to JL Development, Inc.¹ R. 62-73. On February 16, 2001, the Tenant filed objections to the Housing Provider's submission. On February 28, 2001, the Housing Provider filed an opposition to the Tenant's objections. On July 3, 2002, the hearing examiner issued the decision and order. The hearing examiner wrote the following. "After a careful evaluation and analysis of the evidence, the Examiner finds, as a matter of fact:"

1. The subject property is located at 1825 18th Street, N.W.

¹ This is the name of the corporation on the certificate, which was later found to be in error. It should have been L. J. Development, Inc.

2. Erin Marie Dey has resided in Apartment F (also known as apartment #3) at the subject premises since August 15, 1996, and is the Petitioner in this matter.
3. The L.J. Development, Inc., has owned the subject premises at all relevant times and is the Respondent in this matter. The Respondent is a corporation and not a natural person.
4. On November 9, 1992, a Registration/Claim of Exemption Form was filed with RACD in the name of Joseph J. Mahoney III, which claimed that the subject housing accommodation was exempt from the rent stabilization program under D.C. Code 45-2515 (a) (3) and D.C. Code 45-2515 (a) (2).
5. Joseph J. Mahoney III was not the owner or Housing Provider of the subject accommodation on November 9, 1992 or any other date.
6. In August 1996, the Petitioner and the Respondent entered into a written lease of the subject rental unit, for a term of one year, at \$900.00 per month.
7. Before Petitioner executed the lease for the subject housing accommodation with the Respondent, the Respondent did not give her written notice that rents for the subject rental unit were not regulated by the Rent Stabilization Program.
8. The Respondent increased the rent charged Petitioner for the subject housing accommodation from \$900.00 per month to \$1200.00 per month effective November 15, 1999. The Respondent did not give Petitioner written notice of the rent increase before the effective date of the increase; the Respondent sent the Petitioner a letter asking her to acknowledge the rent increase. Petitioner did not execute the letter.
9. The Respondent increased the rent charged Petitioner for subject housing accommodation from \$1200.00 per month to \$1400.00 per month, effective September 15, 2000. The Respondent did not give Petitioner written notice of the rent increase before effective date of the increase.
10. Throughout the entire period of Petitioner's tenancy, the Respondent failed to maintain the housing accommodation in accordance with the Housing Regulations, in that the electric light fixtures in the common hallway and stairwell leading to Petitioner's rental were defective, causing light bulbs to burn out frequently.

11. The value of the reduction in related services or facilities involving the lighting fixtures was 5% of the rent ceiling of Petitioner's rental unit, or \$45.00 per month.
12. For at least a year and a half prior to the hearing of this case, the Respondent failed to maintain the housing accommodation in accordance with housing Regulations, in that the bathtub was inadequately maintained and required reglazing.
13. The value of the reduction in related services or facilities involving the bathtub was 5% of the rent ceiling of Petitioner's rental unit, or \$45.00 per month.

Conclusions of Law

After a careful evaluation of the evidence and findings of fact, the Examiner concludes, as a matter of law:

1. Respondent has failed to prove by a preponderance of the evidence that the subject rental unit, 1825 18th Street, N.W., Apartment F is not exempt from the rent stabilization program pursuant to D.C Code Section 45-2515 (a) (2) and (3).
2. The Respondent illegally raised the rent charge to Petitioner by \$300.00 effective November 15, 1999 without giving Petitioner a proper 30 days notice in violation of 14 DCMR 4205.4.
3. The Respondent illegally raised the rent charge to Petitioner by \$200.00 effective September 15, 2000 without giving Petitioner a proper 30 day notice in violation of 14 DCMR 4205.1.
4. The Respondent substantially reduced related repair services provided to Petitioner's rental unit and the common areas of the housing accommodation in violation of 14 DCMR 4211.6.
5. Petitioner Erin Marie Dye is entitled to a rent refund based on the Respondent's improper rent increase, in violation of D.C. Code Section 45-3509.04 (6).
6. Petitioner Erin Marie Dey is entitled to a refund based on the Respondent's substantial reduction of Petitioner's related services and facilities, in violation of 14 DCMR 4211.6.

Hearing Examiner's Decision at 12-14.

Both parties filed motions for reconsideration; the Tenant filed on July 11, 2002, and the Housing Provider filed on July 18, 2002. On August 5, 2002, the hearing examiner issued an order, which ruled on both of the motions for reconsideration. Both parties filed timely notices of appeal to the Commission.

II. THE CROSS APPEALS

On August 12, 2002, the Tenant filed a notice of appeal, which raised the following issues:

1. The decision and order contains clerical error, by stating, "Respondent has failed to prove by a preponderance of the evidence that the subject rental unit, 1825 18th Street, N.W., Apartment F is not [sic] exempt from the rent stabilization program pursuant to D.C. Code Section 45-2515(a)(2) and (3)." Notice at 2.
2. The hearing examiner erred by failing to award the Tenant treble damages based on the erroneous registration of the housing accommodation as exempt from the Act.
3. The hearing examiner failed to award interest to the date of the decision.
4. The hearing examiner erred by extending the time to rule on the Housing Provider's motion for reconsideration and ruling on the Housing Provider's motion for reconsideration after the time expired.

The Housing Provider filed its notice of appeal on August 22, 2002. It stated the following:

Now Comes the Housing Provider Respondent, L.J. Development, Inc., (hereinafter "Respondent") by and through it's attorney Michelle E. Klass, and respectfully appeals the order issued on August 5, 2002.

Housing Provider Notice of Appeal at 1.

III. DECISION ON THE APPEAL ISSUES

A. The Tenant's Appeal

1. Whether the decision and order contains clerical error, by stating, "Respondent has failed to prove by a preponderance of the evidence that the subject rental unit, 1825 18th Street, N.W., Apartment F is not [sic] exempt from the rent stabilization program pursuant to D.C. Code Section 45-2515(a)(2) and (3)." Notice at 2. Decision at 13.

The text of the decision stated that the Housing Provider could not claim the small Housing Provider exemption under D.C. CODE § 45-2515(a)(3), now D. C. OFFICIAL CODE § 42-3502.05(a)(3), because that exemption was available only to natural persons, and the Housing Provider was a corporation. Citing JDA Ltd. v. Williams, TP 22,232 (RHC Sept. 8, 1992). Decision at 5. The hearing examiner also held that the Housing Provider failed to prove it was exempt under the Act's provision, D.C. Code § 45-2515(a)(2) now D.C. OFFICIAL CODE § 42-3502.05(a)(2) (2001), which provides exemption from the Act for newly created rental units. Decision at 6. Finally, the hearing examiner concluded that the "Respondent has failed to prove by a preponderance of the evidence that the subject rental unit, ... is not exempt from the rent stabilization program...." Decision at 13. The word "not" is inconsistent with the two statements about the Housing Provider's failure to prove exemption, and finding of fact numbered four (4). The burden is on the Housing Provider to prove affirmatively that it is exempt, rather than to negatively prove it is not exempt. Alternatively stated, the burden of proof is on the Housing Provider to prove an exemption from the Act. See Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990); Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007 (D.C. 1987); The Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) at 12-13; Best v. Gayle, TP 23,043 (RHC Nov. 21, 1996) at 5.

However, the Tenant filed a motion for reconsideration on this issue and the hearing examiner granted that part of the motion by stating:

The first claim is that there was clear error on page 13 of the Decision and Order under the Conclusion of Law section number 1 where the word “not” is found before the word exempt. The Petitioner contends that to be consistent with the rest of the Decision and Order the word not should be left out. The Examiner agrees this was a typographical error and the decision shall be corrected to reflect the same.

August 5, 2002 Order on Reconsideration at 2.

Therefore, in the order on reconsideration the hearing examiner reversed himself in conclusion of law number 1, that the Respondent failed to prove it is “not” exempt from the Act, because that was an incorrectly stated standard of proof for the Housing Provider. Normally, this issue would be denied, as moot, because the hearing examiner corrected this part of the decision in the August 5, 2002 order on reconsideration by removing the word “not” before the word “exempt” to express the Housing Provider’s burden of proof. However, the Tenant also challenges the validity of the order on reconsideration, because it was issued on August 5, 2002, due to the Rent Administrator’s enlargement of time to act on the Tenant’s motion.²

The Commission ruled in Killingham v. Wilshire Investment Corp., TP 23,881 (RHC Nov. 22, 1999), that the rules for the Rent Administrator did not allow for enlargement of the time to act on a motion for reconsideration. The Tenant filed the

² The Tenant challenged the hearing examiner’s ruling on the Housing Provider’s motion for reconsideration, because the order issued on August 5, 2002 was beyond the ten (10) days allowed by the rule 14 DCMR § 4013.2 (1991). See issue 4 below. The Commission notes this plain error, pursuant to 14 DCMR § 3807.4 (1991), applies to both parties, because the order on reconsideration disposed of the motions for reconsideration filed by both parties. See Tenants of 2300 and 2330 Good Hope Rd., S.E. v. Marlbury Plaza, LLC, CI 20,753 (RHC Mar. 14, 2002) at n.6.

motion for reconsideration on July 11, 2002. She asserts pursuant to 14 DCMR § 4013.2 (1991) that the tenth (10th) and last day to act on the motion for reconsideration was July 25, 2002, and therefore, pursuant to 14 DCMR § 4013.5 (1991), the motion was deemed denied before August 5, 2002, when the hearing examiner issued the order on the motion. The Tenant's position is correct under the Commission's ruling in Killingham. Therefore, this issue is granted, and the hearing examiner is reversed, since the order dated August 5, 2002 was not valid, because it was issued beyond the ten (10) day period in the rule, 14 DCMR § 4013.2 (1991). On remand, the hearing examiner must state the correct burden of proof for the Housing Provider on exemption.

2. Whether the hearing examiner erred by failing to award the Tenant treble damages based on the erroneous registration of the housing accommodation as exempt from the Act.

The Tenant's counsel argued that the hearing examiner committed error by not awarding the Tenant treble damages. The record shows that the treble damages were first requested on March 12, 2001, in the Tenant's proposed decision and order, after the hearing terminated on February 5, 2001.

The law is that an appeal issue must be raised at the hearing, and if a party fails to raise an issue at the hearing, that party cannot raise that issue on appeal. Lenkin Co. Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 642 A.2d 1282 (D.C. 1994); 1880 Columbia Rd. Tenants' Assoc. v. District of Columbia Rental Hous. Comm'n, 400 A.2d 330, 339 (D.C. 1979). The record also shows that the issue of treble damages was raised in the Tenant's motion for reconsideration and the law is that rulings on a motion for reconsideration are not appealable. See 14 DCMR § 4013.3 (1991). Motions for

reconsideration occur after a hearing and a decision. Therefore, an issue raised in a motion for reconsideration is not appealable to the Commission. This issue is denied and the hearing examiner is affirmed, because the Tenant raised the issue in the proposed decision and order and in the motion for reconsideration, after the hearing closed, instead of during the hearing.

3. Whether the hearing examiner erred when he failed to award interest to the date of the decision.

The Tenant raised as error the hearing examiner's award of interest to the date of the hearing rather than to the date of the decision. The decision stated, "[t]he refund and interest are calculated to the date of the hearing February 5, 2001." Decision at 11. The law is that interest on an award of damages is calculated up to the date of the decision. See Jerome Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 682 A.2d 178 (D.C. 1996), Marshall v. District of Columbia Rental Hous. Comm'n, 533 A.2d 1271 (D.C. 1987). See also 14 DCMR § 3826.2 (D.C. Reg. Feb. 6, 1998), which requires interest to be calculated and awarded to the date of the decision. Accordingly, the hearing examiner is reversed on this issue, which is remanded for calculation of interest to the date of the remand decision and order.

4. Whether the hearing examiner erred by extending the time to rule on the Housing Provider's motion for reconsideration and ruling on the Housing Provider's motion for reconsideration after the time expired.

The Tenant argued that the parties filed their motions for reconsideration on the same day, July 11, 2002.³ Contrary to the Tenant's assertion, the certified file shows that

³ The Tenant's motion for reconsideration was date stamped on July 11, 2003 into the Office of Adjudication. R. at 156.

the Housing Provider's motion for reconsideration was date stamped July 18, 2003 into the Office of Adjudication. R. at 168. Pursuant to 14 DCMR § 4013.2 (1991), the hearing examiner was required to grant or deny the motions within ten (10) days, or the motions would be deemed denied, pursuant to 14 DCMR § 4013.5 (1991). The tenth (10th) business day from July 18, 2002 to rule on the Housing Provider's motion was August 1, 2002. However, the Rent Administrator enlarged the time to August 5, 2002 for the hearing examiner to rule on the motions, because he was absent and on vacation. Therefore, when the hearing examiner issued the order on the motions for reconsideration on August 5, 2002, the motions were already deemed denied, because there is no provision in the rules to extend the time to rule on the motion for reconsideration. See Killingham v. Wilshire Investment Corp., TP 23,881 (RHC Nov. 22, 1999). This issue is granted. See issue 2 above.

B. The Housing Provider's Appeal

Preliminary Issue: Whether the Commission has jurisdiction over an appeal from an order on a motion for reconsideration.

The Commission raised the above stated preliminary issue, because the Housing Provider filed a notice of appeal from the August 5, 2002 order on reconsideration. On July 18, 2002, the Housing Provider filed its motion for reconsideration, which was decided in the hearing examiner's order dated August 5, 2002. The order issued on August 5, 2002, was in response to two motions for reconsideration; one motion filed by each party. The Commission's rules on reconsideration state, "[t]he denial of a motion for reconsideration shall not be subject to reconsideration or appeal." 14 DCMR § 4013.3 (1991).

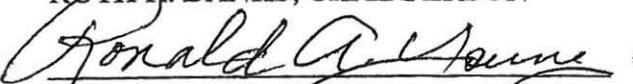
The Housing Provider filed an appeal from the order on reconsideration, as evidenced by the following statement from the notice of appeal:

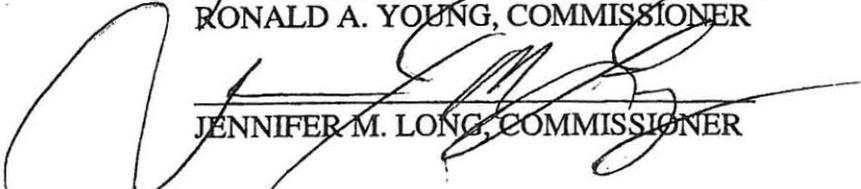
Now Comes the Housing Provider Respondent, L.J. Development, Inc., (hereinafter "Respondent") by and through it's attorney Michelle E. Klass, and respectfully appeals the order issued on August 5, 2002.

Therefore, based on the Commission's rules, the Housing Provider's notice of appeal is dismissed, because it is an attempt to appeal from the August 5, 2002 order on reconsideration, which is not appealable. See issue 2 above. See also Alpar v. Polinger, Shannon and Luchs, TP 27,146, n.1 (RHC Aug. 8, 2003), (where the Commission dismissed an appeal from an order on a motion for reconsideration). The Commission does not have jurisdiction over the Housing Provider's appeal from the order on the motion for reconsideration. The hearing examiner is affirmed on this issue.⁴

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER


JENNIFER M. LONG, COMMISSIONER

⁴ The parties argued at the Commission's hearing about the timeliness of their notices of appeals. The Commission reviewed the notice of the appeal date on the order on reconsideration, which stated the appeal date was no later than August 22, 2002. Both parties appealed by that date. The Commission declines to rule the appeals are untimely, because the Rent Administrator, a judicial officer, caused the error by extending the time to decide the motion for reconsideration and then extending the time to appeal to August 22, 2002. See discussion of actual reliance by appellant on erroneous statement by trial judge in Frain v. District of Columbia, 572 A.2d 447, 451-2 (D.C. 1990).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 26,119 was mailed by priority mail, with confirmation of delivery, postage prepaid this **29th day of August, 2003**, to:

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