

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,445

In re: 1630 R Street, N.W., Unit 730

Ward Two (2)

BORGER MANAGEMENT, INC.
Housing Provider/Appellant

v.

MARK MILLER
Tenant/Appellee

DECISION AND ORDER

May 16, 2005

YOUNG, COMMISSIONER. This case is before the District of Columbia Rental Housing Commission (Commission) following a remand from the District of Columbia Court of Appeals (DCCA). 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, 14 DCMR §§ 3800-4399 (1991) govern these proceedings.

I. PROCEDURAL HISTORY

On February 20, 2002, Mark Miller, the tenant of unit 730 at the housing accommodation located at 1630 R Street, N.W., filed Tenant Petition (TP) 27,445 with the Rental Accommodations and Conversion Division (RACD). In his petition the tenant alleged that the housing provider, Borger Management, Inc., directed retaliatory action against him for exercising his rights in violation of § 502 of the Act.

An Office of Adjudication (OAD) hearing on the petition was held on July 15, 2002. Administrative Law Judge (ALJ) Rorey Smith conducted the OAD hearing. The ALJ issued the decision and order on September 20, 2002. The decision and order concluded as a matter of law:

Respondent retaliated against Petitioner for exercising his rights under § 502 of the Rental Housing Emergency [sic] Act of 1985. D.C. [OFFICIAL CODE] § 42-3505.02 (2001).

Miller v. Borger Mgmt. Inc., TP 27,445 (OAD Sept. 20, 2002) at 7.

On October 3, 2002, the housing provider filed a timely notice of appeal in the Commission. The Commission held the appellate hearing on February 20, 2003. The fourth issue raised by the housing provider stated: "The assessment of a fine by the Administrative Law Judge was arbitrary, capricious and legally erroneous." Notice of Appeal at 1. Pursuant to the notice of appeal, the Commission vacated a \$2090.00 fine, imposed by the ALJ against the housing provider for retaliation against the tenant.

The Commission's decision contained the following discussion regarding this issue:

The ALJ imposed a fine against the housing provider of \$2,090.00, "for retaliating against Petitioner in violation of D.C. [OFFICIAL CODE] § 42-3505.02 (sic)." Miller v. Borger Mgmt. Inc., TP 27,445 (OAD Sept. 20, 2002) at 6. The ALJ offered no further explanation, analysis or reason for the fine. The housing provider argued:

[T]here is no finding in the decision, or for that matter, even a mention of a basis for the Hearing Examiner's determination that the alleged violation of provisions of the Act was willful. Such a finding, with, at a minimum, supporting evidence, is a requirement under the provisions of the District of Columbia Administrative Procedure Act, D.C. [OFFICIAL CODE] § 2-501 *et seq.* (2001 ed.).

Brief at 5. The housing provider relied upon the Commission's decision in Ratner Mgmt. Co. v. Tenants of Shipley Park, TP 11,613 (RHC Nov. 4, 1988), wherein the Commission stated:

We do not find present the element of intent and conscious choice necessary to sustain a finding of willfulness. There is no doubt that the proof sustains the finding that the violations were 'knowing' as the word is used in § 901(a) of the Act, but no testimony was presented to meet the heavier burden imposed by § 901(b) of showing that the landlord's conduct was intentional, or deliberate or the product of a conscious choice.

Ratner at 5.

When a housing provider retaliates against a tenant, he shall be subject to a civil fine. D.C. OFFICIAL CODE § 42-3509.01(b) (2001). The Act states:

Any person who wilfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than \$5,000 for each violation. (emphasis added.)

The Commission addressed the imposition of a fine pursuant to D.C. OFFICIAL CODE § 42-3509.01(b) (2001), in RECAP v. Powell, TP 27,042 (RHC Dec. 19, 2002). The Commission stated:

In Quality Mgmt. Inc. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73, 75-76 (D.C. 1986), the Court quoted the legislative history of the penalty section of the Act to explain the distinction between a "knowing" violation of the Act under § 42-3509.01(a) as distinct from § 42-3509.01(b), which requires a housing provider to act 'willfully' in violation of the Act. The court stated the distinction, 'is further supported by the necessity to draw some independent meaning from the word 'willfully,' as used in ... [§ 42-3509.01(b)].' Id. The Council created legislative history during debates on the distinctions, which states:

From the context it is clear that the word 'willfully' as it is used in [§ 42-3509.01(b)] demands a more culpable mental state than the word 'knowingly' as used in [§ 42-3509.01(a)] There is a difference. 'Willfully' goes to intent to violate the law. 'Knowingly' is simply that you know what you are doing. A different standard. If you know that you are increasing the rent, the fact that you don't intend to violate the law would be 'knowingly.' If you also intended to violate the law, that would

be 'willfully.' Knowingly [is a] lower ... standard. Id. n.6.

RECAP at 5.

In the instant case, the ALJ failed to make findings of facts or conclusions of law on whether the housing provider acted willfully as is required by the terms of the Act. Accordingly, the decision of the ALJ imposing a \$2,090.00 fine is reversed and the fine is vacated.

Borger Mgmt. Inc. v. Miller, TP 27,445 (RHC Mar. 4, 2004) at 10-12.

The tenant appealed to the DCCA the Commission's decision to vacate the fine. On March 24, 2005, the DCCA issued its remand decision. Miller v. District of Columbia Rental Hous. Comm'n, 870 A.2d 556 (D.C. 2005). The Court reversed, in part, and vacated, in part, the Commission's decision and order in Borger Mgmt. Inc. v. Miller, TP 27,445 (RHC Mar. 4, 2004). The DCCA issued its remand decision with an order directed to the Commission.

II. THE DCCA ISSUE

The DCCA remand decision stated:

The District of Columbia Rental Housing Commission (RHC or the Commission) upheld a finding of statutory retaliation by a housing provider against tenant-petitioner Mark S. Miller. See D.C. Code § 42-3505.02 (2001). The RHC went on, however, to vacate a fine of \$ 2,090 which the Administrative Law Judge (ALJ) had imposed as a sanction because, in the RHC's view, the ALJ had 'failed to make findings of fact or conclusions of law on whether the housing provider acted willfully as is required by the [fine provision] of the [Rental Housing] Act.' Miller now petitions for review of that decision, contending that the RHC erred in concluding that the statutory adverb 'willfully' -- denoting the mental state necessary to permit imposition of a fine -- requires proof and related findings beyond what the ALJ found in determining that the housing provider had engaged in retaliation.

This court has previously rejected that argument, at least in dictum; and, in any event, the RHC's interpretation of 'willfully' as requiring more than the 'knowing' conduct sufficient to constitute a violation of the Act (here retaliation) is a reasonable one that we sustain. There is,

however, a problem with the RHC's disposition. The Commission did not determine -- certainly not on the face of its opinion -- that no substantial evidence would have supported a conclusion of 'willful' conduct by the housing provider. It held only that the ALJ had not made findings directed to that issue and, therefore, to the propriety of imposing a fine. Absent a holding by the RHC that no conclusion of willfulness could be made as a matter of law on this record, the proper course for it was not to strike the fine simpliciter but rather to return the case to the ALJ for findings of fact related to that issue. We accordingly vacate the portion of the RHC's decision striking the fine and remand the case to it for further proceedings.

Miller v. District of Columbia Rental Hous. Comm'n, 870 A.2d 556 (D.C. 2005).

III. THE COMMISSION'S REMAND DECISION

Pursuant to the court's decision in Miller, the Commission's decision in TP 27,445 is remanded to the Rent Administrator for findings of fact and conclusions of law on the issue of whether the housing provider, Borger Management, Inc., willfully retaliated against the tenant, subjecting the housing provider to a \$2090.00 fine pursuant to D.C. OFFICIAL CODE § 42-3509.01(b) (2001). See Miller v. District of Columbia Rental Hous. Comm'n, 870 A.2d 556, 559 (D.C. 2005).

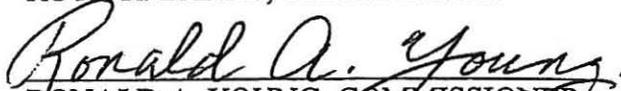
IV. CONCLUSION

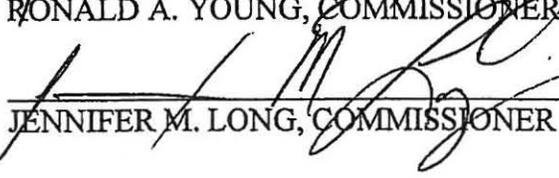
The decision is remanded to the Rent Administrator for findings of fact and conclusions of law on the issue of whether the housing provider, Borger Management,

Inc., willfully retaliated against the tenant, subjecting the housing provider to a \$2090.00 fine. The hearing examiner shall not conduct a new hearing or receive additional evidence. See Wire Properties v. District of Columbia Rental Hous. Comm'n, 476 A.2d 679 (D.C. 1984).

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER


JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

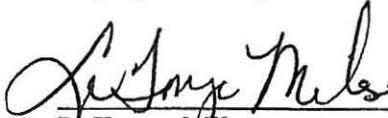
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 27,445 was mailed postage prepaid by priority mail, with delivery confirmation on this day **16th of May, 2005** to:

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