

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,673

In re: 3446 Connecticut Avenue, N.W., Unit 403

Ward Three (3)

JOHN HOSKINSON
Housing Provider/Appellant

v.

LARS SOLEM
Tenant/Appellee

DECISION AND ORDER

July 20, 2005

PER CURIAM. This case is on appeal to the Rental Housing Commission from a decision and order issued by the Rent Administrator, based on a petition filed in the Rental Accommodations and Conversion Division (RACD). 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 (DCMR), 14 DCMR §§ 3800-4399 (1991), govern the proceedings.

I. THE PROCEDURES

Lars Solem, tenant, filed Tenant Petition (TP) 27,673 on November 6, 2002. In the petition, the tenant alleged that: 1) rent increases were taken while the tenant's unit was not in substantial compliance with the District of Columbia Housing Regulations; 2) the services and/or facilities provided in connection with the rental of the tenant's unit

were substantially reduced; and 3) the housing provider, manager, or other agent, directed retaliatory action against the tenant for exercising his rights in violation of § 502 of the Act.

An RACD hearing was held on February 13, 2003 with Hearing Examiner Sandra McNair presiding. On August 7, 2003, the hearing examiner issued her decision and order. The decision and order contained the following:

Findings of Fact:

1. The Petitioner took possession of apartment # 403 on June 6, 2000, and has resided at the subject premises at all relevant times, without interruption.
2. The Respondent, John Hoskinson, manages the subject property.
3. The Examiner has jurisdiction to address the Petitioner's claims concerning the rental increases, substantial reduction of services or facilities, and retaliation since the housing accommodation is not exempt pursuant to the Rental Housing Act of 1985.
4. The Petitioner failed to meet his burden of proof to substantiate the claim that a rental increase was demanded or implemented while the housing accommodation was not in substantial compliance with the Housing Regulations.
5. The Petitioner failed to meet his burden of proof to substantiate a claim for reduction of services or facilities.
6. The Petitioner has proven, by a preponderance of evidence, that the Respondent has retaliated against him in violation of D.C. OFFICIAL CODE § 42-3505.02 and the Respondent has failed to rebut the presumption of retaliation.

Solem v. Hoskinson, TP 27,673 (RACD Sept. 11, 2003) at 4.

Conclusions of Law:

1. The Petitioner has not proven, by a preponderance of the evidence, that the Respondent demanded or implemented a rental increase while Petitioner's rental unit was not in substantial compliance with the Housing Regulations.

2. The Petitioner has not proven, by a preponderance of the evidence, that the Respondent substantially reduced Petitioner's facilities and other service to his unit at the subject property and adversely affected Petitioner's health, welfare or safety.
3. The Petitioner is not entitled to a rent rollback or a trebled rent refund for his claim of substantial reduction in the services or facilities.
4. The Petitioner has proven, by a preponderance of evidence, that the Respondent has retaliated against him in violation of D.C. OFFICIAL CODE § 42-3505.02 and the Respondent has failed to rebut the presumption of retaliation.

Id. at 12.

On September 2, 2003, the housing provider filed a notice of appeal with the Commission and a hearing was held on April 13, 2004.

II. THE ISSUES

In his Notice of Appeal, the housing provider raised the following five issues:

- A. The Hearing Examiner erred in imposing a fine in the amount of \$1,500.00 upon the Housing Provider/Respondent.
- B. The evidence presented is not sufficient to meet the standard necessary to demonstrate a willful violation of the provisions of the Rental Housing Act of 1985, as amended.
- C. The issuance of the Barring Notice by MPM Management, Inc., constituted a proper exercise of a legal right and therefore cannot form the basis of retaliatory conduct.
- D. The evidence below failed to establish a nexus between the alleged retaliatory conduct and the exercise by the Tenant/Petitioner of any rights provided to tenants under the Rental Housing Act of 1985, as amended.
- E. The imposition of a fine was arbitrary, capricious, and an abuse of discretion.

Notice of Appeal at 1.

III. DISCUSSION OF THE ISSUES

- A. **The Hearing Examiner erred in imposing a fine in the amount of \$1,500.00 upon the Housing Provider/Respondent.**
- E. **The imposition of a fine was arbitrary, capricious, and an abuse of discretion.**

The Act provides that “[a]ny person who wilfully ... commits any ... act in violation of any provision of this chapter or of any final administrative order issued under this chapter ... shall be subject to a civil fine of not more than \$5,000 for each violation.” D.C. OFFICIAL CODE § 42-3509.01(b) (2001).

In the instant case, the hearing examiner imposed a fine pursuant to § 42-3509.01(b), but made no findings of fact or conclusions of law regarding the willfulness of the housing provider’s violation. See discussion, Part III. B. Therefore, the requirements for imposing a fine pursuant to § 42-3509.01(b) were not met because the hearing examiner made no findings of willfulness; therefore, the hearing examiner erred in imposing a fine on the housing provider. Accordingly, these appeal issues are granted and are remanded to the hearing examiner for findings of fact and conclusions of law on the willfulness of the violation in accordance with § 42-3509.01(b).

- B. **The evidence presented is not sufficient to meet the standard necessary to demonstrate a willful violation of the provisions of the Rental Housing Act of 1985, as amended.**

As stated above, the Act provides that “[a]ny person who wilfully ... commits any ... act in violation of any provision of this chapter or of any final administrative order issued under this chapter ... shall be subject to a civil fine of not more than \$5,000 for each violation.” D.C. OFFICIAL CODE § 42-3509.01(b) (2001). In Quality Mgmt., Inc. v. District of Columbia Rental Hous. Comm’n, 505 A.2d 73 (D.C. 1986), the District of

Columbia Court of Appeals stated in its opinion that “[f]rom the context it is clear that the word ‘willfully’ as used in § [42-3509.01(b)] demands a more culpable mental state than the word ‘knowingly’ as used in § [42-3509.01(a)].” Id. at 76. In other words, the term “willfully” in § 42-3509.01(b) relates to whether or not the person committing the act intended to violate the law. Id. For example, if the housing provider’s actions were actually in response to a tenant’s actions, that may be considered willful; however, if the housing provider’s actions were merely coincidental, they would not be considered willful. Simply doing the act, but without intending to violate the law, would be knowing, but not willful. Id.

In the instant case, the hearing examiner made no findings directed to the issue of willfulness. However, “[a]bsent a holding by the RHC that no conclusion of willfulness could be made as a matter of law on this record, the proper course [is] not to strike the fine *simpliciter*, but rather to return the case to the [hearing examiner] for findings of fact related to that issue.” Miller v. District of Columbia Rental Hous. Comm’n, 870 A.2d 556, 558 (D.C. 2005). The Commission here does not hold that no conclusion of willfulness could be made as a matter of law on this record. Therefore, this issue is remanded to the hearing examiner for findings of fact and conclusions of law on the willfulness of the housing provider’s violation.

- C. **The evidence below failed to establish a nexus between the alleged retaliatory conduct and the exercise by the [tenant] of any rights provided to tenants under the Rental Housing Act of 1985, as amended.**

- D. **The issuance of the Barring Notice by MPM Management, Inc., constituted a proper exercise of a legal right and therefore cannot form the basis of retaliatory conduct.**

The housing provider issued a Barring Notice to the tenant, who was barred from entering the rental offices of two apartment buildings managed by the same property manager as the tenant's building. The Act provides that "[n]o housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant" by law. D.C. OFFICIAL CODE § 42-3505.02(a) (2001). Subsection 42-3505.02(b) further provides:

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 judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 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 in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
- 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 regulations;
- 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.

Essentially, a tenant must show two things in support of a claim of

retaliation. The first showing is that the housing provider took some adverse action against the tenant prohibited by § 42-3505.02(a).¹ The second showing is that the housing provider's adverse action occurred within six months of the tenant's exercise of a right set forth in § 42-3505.02(b), supra. If the tenant makes these showings, there is a statutory presumption that the housing provider has retaliated against the tenant. Furthermore, if the housing provider does not rebut this presumption with clear and convincing evidence² that its actions were not in retaliation of the tenant's exercise of a legal right, the trier of fact will enter judgment in favor of the tenant. Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003).

In the instant case, the housing provider appeals the judgment of the hearing examiner in favor of the tenant on the issue of retaliation because, he asserts, there is no connection offered by the evidence below between the housing provider's alleged retaliatory actions and the tenant's exercise of a right pursuant to the Act. Record evidence shows that the tenant contacted government officials regarding housing code violations in his unit, which is a right conferred upon the tenant by § 42-3505.02(b)(2). Furthermore, record evidence shows that a DCRA housing inspection took place on

¹ D.C. OFFICIAL CODE § 42-3505.02(a) (2001) provides:

No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

² "Clear and convincing evidence is most easily defined as the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt." Addington v. Texas, 441 U.S. 418, 423-24 (U.S. 1979).

September 4, 2002 and that the housing provider subsequently issued a Barring Notice to the tenant on September 24, 2002. These two events, the inspection and the Barring Notice, were well within the six-month period stated in the Act. Therefore, there is a statutory presumption of retaliation by the housing provider.

The only evidence offered by the housing provider to rebut this presumption was the testimony of the housing provider that the Barring Notice was issued in response to the tenant's behavior in the rental office of another building under the same management. Record evidence shows the housing provider did not provide any witnesses or documentary evidence to support this rebuttal. Therefore, while the housing provider provided evidence to rebut the statutory presumption of retaliation, he did not provide evidence that was clear and convincing.

Because the issuance of the Barring Notice by the housing provider occurred within six months of the tenant's exercise of a right under the Act, there is a sufficient connection between the tenant's action, requesting a housing inspection, and the housing provider's conduct, issuing the Barring Notice, to invoke a statutory presumption of retaliation. Furthermore, the housing provider failed to put forward clear and convincing evidence to rebut this presumption.

As stated above, once there is a statutory presumption of retaliation, the burden of proof shifts to the housing provider to provide clear and convincing evidence that he did *not* engage in such action in retaliation of the tenant's actions. D.C. OFFICIAL CODE § 42-3505.02(b) (2001). Such evidence, however, must extend "beyond the defense that a law permitted the alleged retaliatory act." Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003) (where the Commission used the example of a housing provider rebutting the

presumption of retaliation by showing that his actions were taken for an economic reason and not in response to a tenant's behavior). Under the Act, a housing provider who is presumed to have retaliated against a tenant "is presumed to have taken 'an action not otherwise permitted by the law' unless [they] can meet [their] burden under the statute." De Szunyogh v. William C. Smith & Co., 604 A.2d 1, 4 (D.C. 1992), cited in Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003).

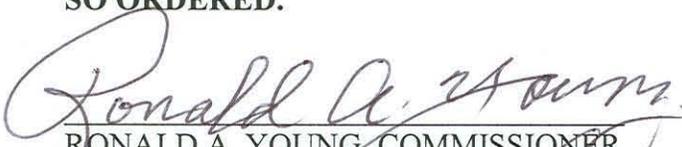
Here, the housing provider issued a Barring Notice to the tenant. The housing provider testified that he issued the notice because of the tenant's erratic behavior in the rental office at a location different from the tenant's housing accommodation. The housing provider appeals the finding of retaliatory conduct based on the fact that the issuance of a Barring Notice is a proper exercise of a legal right. It is clear, based on the DCCA's decision in De Szunyogh, that the issuance of a Barring Notice, while being the proper exercise of a legal right, is still presumed to be retaliatory in nature if such issuance occurred within six months of the tenant's exercise of a right conferred on him under the Act, and if the housing provider does not provide clear and convincing evidence to rebut the presumption. Therefore, though the issuance of the Barring Notice was a proper exercise of a legal right of the housing provider, this fact is not sufficient to rebut the presumption of retaliation according to the DCCA's decision in De Szunyogh. Accordingly, these appeal issues are denied.

IV. CONCLUSION

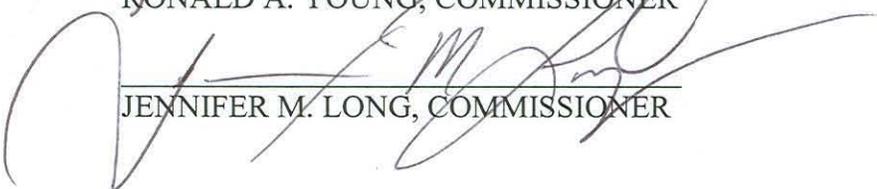
The hearing examiner made no findings of fact or conclusions of law on the willfulness of the violation of the housing provider. Therefore, the hearing examiner erred in imposing a fine on the housing provider. However, the Commission does not

hold that no conclusion of willfulness could be made as a matter of law on this record. Therefore, appeal issues A, B, and E are remanded for findings of fact and conclusions of law on the willfulness of the housing provider's violation of the retaliation provision of the statute. Because the issuance of the Barring Notice by the housing provider occurred within six months of the tenant's exercise of a right under the Act, there is a sufficient connection between the tenant's action and the housing provider's conduct to trigger a statutory presumption of retaliation. Further, the housing provider failed to put forward clear and convincing evidence to rebut this presumption. Finally, though the issuance of the Barring Notice was a proper exercise of a legal right of the housing provider, this fact does not serve as evidence that the housing provider did not retaliate, in accordance with the DCCA's decision in De Szunyogh. Therefore, appeal issues C and D are denied.

SO ORDERED.



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 issues 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."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The Court may be contacted at the following address and telephone number:

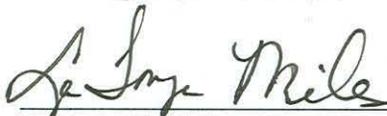
D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 27,673 was mailed by priority mail with delivery confirmation, postage prepaid, this **20th** day of **July 2005**, to:

Lars Solem
3446 Connecticut Avenue, N.W.
Unit 403
Washington, D.C. 20008

Richard Luchs, Esquire
Greenstein, DeLorme & Luchs, P.C.
1620 L Street, N.W., Suite 900
Washington, D.C. 20036



LaTonya Miles
Contact Representative
(202) 442-8949