

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,707

In re: 1280 21st Street, N.W., Unit 310

Ward Two (2)

ELIZABETH HINES
Tenant/Appellant

v.

BRAWNER COMPANY
Housing Provider/Appellee

DECISION AND ORDER

September 7, 2004

PER CURIAM. 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. 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

Elizabeth Hines, the tenant/appellant, filed Tenant Petition (TP) 27,707, with the Rental Accommodations and Conversion Division (RACD), on December 23, 2002. In her petition Ms. Hines, who occupied unit 310 at the housing accommodation at 1280 21st Street, N.W., alleged that the housing provider/appellee, the Brawner Company: 1) permanently eliminated services and or facilities provided in connection with her rental

unit; 2) substantially reduced services and or facilities provided in connection with her rental unit; 3) directed retaliatory action against her for exercising her rights in violation of § 502 of the Act; and 4) served on her a Notice to Vacate which violated the requirements of section 501 of the Act.

A hearing on the petition was held on March 24, 2003, with Hearing Examiner Carl Bradford presiding. Present at the hearing were Lisa Milne, a property manager for the housing provider, Irene Lindner, Esquire, a witness for the housing provider, and Stephen O. Hessler, Esquire, counsel for the housing provider. The tenant failed to appear for the hearing despite the fact that the official record reflects proper notice was delivered to the parties in the manner prescribed by the Act.¹ The tenant failed to appear for the hearing after submitting to the Rent Administrator an emergency motion for continuance in a facsimile message dated March 23, 2003, one day before the hearing. No notice of the motion for continuance was served on the housing provider. The tenant, after being advised that the motion was untimely filed, requested that she be allowed to withdraw the petition without prejudice.

At the hearing, counsel for the housing provider moved to dismiss the tenant petition with prejudice because the tenant failed to appear and prosecute the tenant petition and based on a proffer that the issues raised in the tenant petition had been adjudicated by the Superior Court of the District of Columbia, Landlord-Tenant Branch in Lindner v. Hines, LT 28686-02.

¹ The Act, D.C. OFFICIAL CODE § 42-3502.16(c) (2001), states:

If a hearing is requested timely by either party, notice of the time and place of the hearing shall be furnished the parties by certified mail or other form of service which assures delivery at least 15 days before commencement of the hearing. The notice shall inform each of the parties of the party's right to retain legal counsel to represent the party at the hearing.

On April 4, 2003, the hearing examiner issued his decision and order. The hearing examiner made the following relevant findings of fact:

4. In [sic] July 31, 2002, Respondent filed a suit for possession in D.C. Superior Court, Landlord/Tenant Branch against Petitioner for non-payment of rent, LT 28686-02.
5. The parties in LT 28686-02 and T/P 27,707 are the same.
6. The issues raised in T/P 27,707 were or could have been litigated in LT 28686-02.
7. Petitioner requested that she be allowed to withdraw her Petition without prejudice.
8. Respondent requested that Petitioner's motion be denied.

Hines v. Brawner Co., TP 27,707 (RACD Apr. 4, 2003) at 3-4. The hearing examiner concluded as a matter of law:

1. Res judicata is a bar to further adjudication of the instant tenant petition because a valid, final disposition was made in the prior Landlord and Tenant Court Case LT 28686-02, parties are the same and the issues and evidence necessary to prove the issues are the same, as in T/P 27,707.
2. The petition is dismissed pursuant to D.C. Official Code § 42-3502 (2001) & [sic] res judicata.

Id. at 4. On April 23, 2003, the tenant filed a timely Motion for Reconsideration pursuant to 14 DCMR § 4013.1 (1991).² The hearing examiner determined that the tenant's

² The Rental Housing Regulation 14 DCMR § 4013.1 (1991), provides:

Any party served with a final decision and order may file a motion for reconsideration with the hearing examiner within 10 days of receipt of that decision, only under the following circumstances:

- (a) If there has been a default judgment because of the non-appearance of the Party;
- (b) If the decision or order contains typographical, numerical, or technical errors;
- (c) If the decision or order contains clear error that is evident on its face; or
- (d) If the existence of newly discovered evidence, which could not have been discovered prior to the hearing date, has been discovered.

Motion for Reconsideration had no merit and denied the motion. On May 13, 2003, the tenant filed a notice of appeal with the Commission. The Commission held the appellate hearing on November 17, 2003.

II. ISSUES ON APPEAL

On appeal, the tenant raised the following issues:

1. [T]he Hearing Examiner erred in holding that the Petition was barred under the principle of res judicata.
2. [T]he Hearing Examiner erred in relying upon the suggestion of defendant's counsel that a case previously decided in the Superior Court of the District of Columbia had disposed of the same issues, between the same parties, as were involved in T/P 27,707.
3. [T]he Hearing Examiner erred in concluding Tenant/Petitioner did not have good cause for failing to appear for the scheduled hearing.
4. [T]he Hearing Examiner erred in failing to allow petitioner a continuance in light of the obvious inequity that would result from requiring her to proceed without counsel; and
5. [T]he Hearing Examiner erred in concluding that the unsupported allegation that res judicata applied was evidence of lack of good faith in failing to appear..

Notice of Appeal at 1.

III. DISCUSSION OF THE ISSUES

- A. **Whether the hearing examiner erred in holding that the Petition was barred by the doctrine of res judicata.**
- B. **Whether the hearing examiner erred when he determined that a decision in the Superior Court of the District of Columbia in LT 28686-02 disposed of the same issues, between the same parties, as were involved in TP 27,707.**
- E. **Whether the hearing examiner erred in concluding that the unsupported allegation that res judicata applied was evidence of lack of good faith in failing to appear.**

The hearing examiner concluded in his decision that the tenant's petition was barred by the doctrine of res judicata. Based on this finding the hearing examiner dismissed the petition with prejudice. The decision stated:

The counsel for Respondent indicated that a related case involving the same parties was tried in D. C. Superior Court Landlord Tenant Division, Brawner Co. v. Hines, # 28686-02. Judge Blackburn-Rigsby found in favor of the landlord based on non-payment of rent. It is for this reason also that the Examiner determines in this case that the petition should be dismissed because res iudicata applies; a copy of the praecipe was attached to the Respondent's Motion for dismissal.

...

The Examiner found that the facts in this case, the arguments proffered and the evidence in support thereof clearly support dismissal under the res iudicata doctrine, as set forth in Henderson.

First, the parties to D. C. Superior Court Landlord and the Tenant Branch "Court" case LT #28686-02 and the instant RACD petition are the same, namely Elizabeth Hines and [the] Brawner Company. Second, LT #28686-02 was an action for possession filed by Respondent against Petitioner for nonpayment of rent. A judgement [sic] praecipe was signed by the Court on December 13, 2002. Thus, LT 28686-02 is a final decision in the form of the praecipe, because neither party filed an appeal or noncompliance motion within the statutory period. Finally, T/P 27,707 is the second of the two actions between the parties and there is sufficient identity of issues, between the two actions, to conclude that Petitioner would be relitigating issues that have already been settled in Superior Court. Clearly, the evidence necessary to establish the defense in question by Petitioner in Court, had Petitioner chosen to do so, is similar to the evidence necessary for her to have prevailed in the RACD proceeding. In both forums, housing inspection reports, repair invoices, relevant provisions of the Act and [r]ules, and supporting testimony would have been considered as the basis for any findings of fact and conclusions of law rendered by the [c]ourt in the LT case and the [a]gency, in this case.

Hines v. Brawner Co., TP 27,707 (RACD Apr. 4, 2003) at 2-3.

The hearing examiner concluded in his decision that the tenant's petition was barred by the doctrine of res judicata. The doctrine of res judicata requires that a valid, final judgment rendered on the merits bar any subsequent action based on the same claim(s), between the same parties or those in privity with them. Henderson v. Snider Bros., Inc., 439 A.2d 481 (1981). The application of res judicata "estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented." Id. at 484; see also Russel v. Smithy Braedon Prop. Co., TP 23,361 (RHC July 20, 1995). The hearing examiner concluded in dismissing the petition that "...a valid, final disposition was made in the prior Landlord and Tenant Court Case LT 28686-02, [the] parties are the same[,] and the issues and evidence necessary to prove the issues are the same, as in T/P 27,707." Decision at 4.

The record in the instant case reflects that counsel for the housing provider did submit a copy of the court's praecipe dated December 13, 2002. Record (R.) at 69. However, the record reveals that the correct title of LT 28686-02 is "Lindner v. Hines," and that the housing provider in the instant case, Brawner Company was not named in or a party to the landlord/tenant action. The hearing examiner in his decision, referred to LT 28686-02 as "Brawner Co. v. Hines," and found that LT 28686-02 and TP 27,707 involved the same parties. See Hines v. Brawner Co., TP 27,707 (RACD Apr. 4, 2003) at 2. The record reflects that Irene Lindner, a prospective witness in the tenant petition, was the plaintiff in the Landlord-Tenant action and was awarded possession of the housing accommodation.

Res judicata is an affirmative defense that must be pleaded and established by a proponent. See Johnson v. District of Columbia Rental Hous. Comm'n, 642 A.2d 135

(D.C. 1994). At the RACD hearing, the housing provider failed to meet its burden of showing that res judicata was properly invoked where the plaintiff in the Landlord-Tenant action, Irene Lindner, was not the same or in privity with the Brawner Company, the housing provider named in the tenant petition. Accordingly, the decision of the hearing examiner concluding that res judicata barred the tenant in the instant case from raising issues previously raised in Lindner v. Hines, LT 28686-02, is reversed.

C. Whether the hearing examiner erred in concluding that the tenant did not have good cause for failing to appear for the scheduled hearing.

In his decision, the hearing examiner ordered that the tenant petition be dismissed with prejudice. Decision at 4. The hearing examiner ordered the dismissal of the tenant petition with prejudice after a discussion in his decision concerning the factors, including good cause, to be considered when deciding to dismiss an appeal with or without prejudice.

Prejudice attaches only in the absence of good cause. In the instant case, the hearing examiner dismissed the tenant petition with prejudice indicating a finding of an absence of good cause. The Rental Housing Commission set forth the standard for dismissing a petition with or without prejudice in Wayne Gardens Tenant Ass'n v. H&M Enterprises, TP 11,845 (RHC Sep. 27, 1985). In Wayne Gardens the Commission stated: “[I]n review, we seek to determine if good cause exists to justify a dismissal without prejudice. If the record does not contain sufficient facts and circumstances to constitute good cause why prejudice should not attach, the Examiner’s dismissal on Petitioner’s default must be with prejudice.”

Hearing Examiner Bradford issued an order dismissing TP 27,707 with prejudice. However, the hearing examiner did not issue a finding of fact or conclusion of law

concerning whether good cause existed. Since the hearing examiner failed to issue a finding of fact concerning the existence of good cause, his order to dismiss TP 27,707 with prejudice did not flow rationally from the findings of fact. The court has consistently held that “[t]here must be one or more affirmative, written findings on each [material] contested issue of fact. Citizens Ass’n of Georgetown, Inc. v. District of Columbia Zoning Comm’n, 402 A.2d 36, 42 (D.C. 1979) (quoting Dietrich v. Bd. of Zoning Adjustment, 293 A.2d 470, 472-473 (D.C. 1972)).

The District of Columbia Court of Appeals has addressed this omission of fact finding and stated, “[w]e will continue to order that administrative agencies specify the precise findings and conclusions which support their decisions.” Braddock v. Smith, 711 A.2d 835, 838 (D.C. 1998) (quoting Newsweek Magazine v. District of Columbia Comm’n on Human Rights, 376 A.2d 777, 784 (D.C. 1977)); see also Tyler v. Byrd, TP 21,821 (RHC Jan. 13, 1998) in which the Commission reversed and remanded the hearing examiner’s decision, because he failed to make adequate findings of fact. To meet the requirement of the DCAPA, D.C. OFFICIAL CODE § 2-509(e), the decision must state findings of facts on each material, contested, factual issue; those findings must be based on substantial evidence; and the conclusion of law must follow rationally from the findings. See Perkins v. District of Columbia Dep’t of Employment Servs., 482 A.2d 401, 402 (D.C. 1984).

When the decision and order does not contain findings of fact, the reviewing body is compelled to remand the matter, because the record is insufficient for review. See Hedgman v. District of Columbia Hackers’ License Appeal Bd., 549 A.2d 720 (D.C. 1988). Accordingly, the decision of the hearing examiner is remanded for findings of

facts and conclusions of law, based on the present record, concerning his decision to dismiss the tenant petition with prejudice.

D. Whether the hearing examiner erred when he denied petitioner an emergency continuance to avoid the inequity of having her proceed without counsel.

As stated by the hearing examiner in his April 4, 2003 decision and order, the tenant submitted to the Office of the Rent Administrator by facsimile message an “Emergency Motion for Continuance” on March 23, 2003, one day before the RACD hearing. The reason as stated by the tenant for her request was the need to obtain counsel. The hearing examiner also states in his decision that the tenant was informed that her motion was untimely, was not properly served on the housing provider, and would be denied.

The denial of a continuance is a discretionary act and reviewable only to determine whether there has been an abuse of discretion. Ammerman v. District of Columbia Rental Accommodations Comm’n, 375 A.2d 1060, 1063 (D.C. 1977); Jennings v. Gilbertson, 74 A.2d 839, 841 (D.C. 1950), cited in Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993). The rules regarding continuances in Rent Administrator hearings provide in part:

Any party may move to request a continuance of any scheduled hearing or extension of time to file a pleading or leave to amend a pleading if the motion is served on opposing parties and the Rent Administrator at least five (5) days before the hearing or the due date; however, in the event of extraordinary circumstances, the time limit may be shortened by the Rent Administrator.

14 DCMR § 4014.1 (1991).

Conflicting engagements of counsel, absence of counsel, or the employment of new counsel shall not be regarded as good cause for continuance unless set forth promptly after notice of the hearing has been given.

14 DCMR § 4014.3 (1991).

The record reflects that the tenant received notice of the RACD hearing in February, 2003 well before the March 24, 2003 hearing. Moreover, according to 14 DCMR § 4014.1 (1991), the tenant had the opportunity to seek a timely continuance to obtain counsel. The regulation, 14 DCMR § 4014.1 (1991) imposes a duty “upon a person who wants counsel, but has yet to secure counsel, to seek a continuance at least five days prior to the hearing date.” Shapiro v. Comer, supra at 63.

The fact that the tenant requested a continuance gave her no right to presume it would be granted. The regulations permit the hearing examiner to order a continuance where he or she determines, at the RACD hearing, that the assistance of an attorney is required. Those regulations, 14 DCMR § 4004.6 and 4004.7 (1991) provide:

If it appears to the hearing examiner at any time during the proceedings that the matter under review is so complicated or that the potential liabilities are so great that in the interest of justice a party ought to be represented by an attorney, the hearing examiner shall urge the party to obtain the services of an attorney.

If the party agrees to obtain the services of an attorney, the opposing party shall be so advised, and the hearing on the matter shall be continued for a reasonable time in order to allow the party to retain counsel and prepare for a hearing. The continuance shall not exceed (30) days.

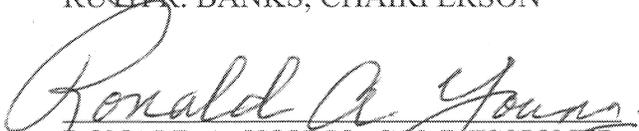
In the instant case, the tenant failed to appear for the RACD hearing after she was verbally notified that her untimely motion would be denied. Therefore, the Commission holds that the hearing examiner did not abuse his discretion when he did not grant the continuance. Accordingly, this appeal issue is denied.

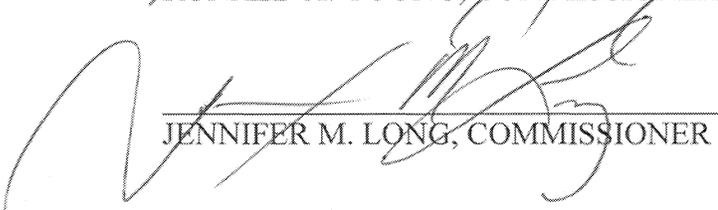
IV. CONCLUSION

The hearing examiner's decision that the instant tenant petition is barred by the doctrine of res judicata is reversed. The hearing examiner's decision to dismiss the tenant petition with prejudice is reversed and remanded for findings of fact and conclusions of law, on the present record, supporting his decision to dismiss the petition with prejudice. The tenant's appeal of the decision to deny her "Emergency Motion for Continuance," is denied.

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."

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’s Rule, D.C. App. R. 15(a), provides in part: “Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thirty days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed ... and by tendering the prescribed docketing fee to the clerk.” The Court may be contacted at the following address and telephone number:

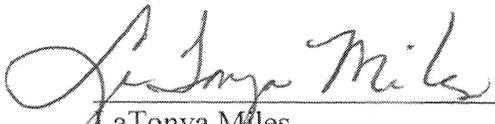
D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Decision and Order** in TP 27,707 was mailed postage prepaid by priority mail, with delivery confirmation on this **7th day of September, 2004** to:

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Washington, D.C. 20018

Stephen O. Hessler, Esq.
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LaTonya Miles
Contact Representative
(202) 442-8949.

JUDICIAL REVIEW

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