

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,733

In re: 308 Oglethorpe Street, N.E.

Ward Four (4)

SUMAYYA I. LANE
Tenant/Appellant

v.

NETTIE NICHOLS¹
Housing Provider/Appellee

DECISION AND ORDER

August 10, 2004

PER CURIAM. 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. PROCEDURES.

On January 24, 2003, Sumayya I. Lane, the Tenant, filed Tenant Petition (TP) 27,733. The Tenant alleged in the petition, “[r]etaliatory action has been directed against

¹ Pursuant to 14 DCMR § 3807.4 (1991), the Commission noted plain error by the hearing examiner. The housing provider/appellee’s last name is Nichols, not Nichole, as stated on the RACD decision and order. See Attendance Sheet (RACD Mar. 12, 2003) Record (R.) at 26 and Complaint for Possession of Real Estate, R. at 3, where her name is correctly spelled. Pursuant to 14 DCMR § 3809.3 (1991), “[when] it appears to the Commission that the identity of the parties has been incorrectly determined by the Rent Administrator, the Commission may substitute or add the correct parties on its own motion.” In this appeal, the correct last name of the Housing Provider is Nichols, which is the name in the caption of this appeal.

me/us by my/our Housing Provider, manager or other agent for exercising our rights in violation of section 502 of the Rental Housing Emergency [sic] Act of 1985.” Record (R.) at 19. The Rent Administrator scheduled and held a hearing on the petition on March 12, 2003.

On July 15, 2003, Hearing Examiner Carl Bradford issued the decision and order, which contained the following findings of fact:

1. That Petitioner has been a tenant at 308 Oglethorpe Street, N.E., Washington, D.C. 20011 since April 1, 2002.
2. Nettie Nichols owns the housing accommodation located at 308 Oglethorpe Street, N.E., Washington, D.C. 20001 [sic][.]
3. Respondent has properly registered the property as required under 14 DCMR and D.C. O[FFICIAL] C[ODE] § 42-3502.05 (2001).
4. The housing accommodation is exempt from the purview of Title II of the Act[,] the Rent Stabilization Program (“rent control”).

Lane v. Nichole,² TP 27,733 (RACD July 15, 2003) at 4.

The decision and order contained the following conclusions of law:

1. Respondents have properly registered the subject housing accommodation pursuant to D.C. O[FFICIAL] C[ODE] § 42-3502.05 (2001). The property is exempt pursuant to section 205(a)(3) of the Rental Housing Act of 1985 (Act).
2. All issues in the instant petition are dismissed.

Id.

Hearing Examiner Bradford dismissed the tenant petition with prejudice. Id. On July 23, 2003, the tenant filed a motion for reconsideration with the Rent Administrator. Hearing Examiner Bradford did not respond to the tenant’s motion for reconsideration.

² The housing provider’s name was misspelled in the caption of the RACD decision. See n.1 above.

Therefore, it was denied by operation of law, pursuant to 14 DCMR § 4013 (1991).³ On August 13, 2003, the tenant filed a notice of appeal with the Commission.

II. THE ISSUES

The Tenant filed a timely notice of appeal with the Commission from the Rent Administrator's decision and order. The following issues are raised in the Tenant's notice of appeal:

- A. Issues of retaliation are not considered under the jurisdiction of the Landlord/Tenant Court[.]
- B. Tenant's lease started April 1, 2002 and [she] was in possession at that time; Respondent's [c]opy of registration and Certificate of Occupancy were dated April 15, 2003; one year after occupancy of the property. These documents are dated after the hearing[,], which was held on March 12, 2003.
- C. Tenant has in her possession a letter from the Rental Accommodations and Conversion Division (RACD) that Housing Provider was in violation of not be [sic] registered at the lease start date.
- D. That Nettie Nichols is not the owner of the housing accommodation located at 308 Oglethorpe Street, NE [sic] Washington, DC [sic] 20011. She is the Power of Attorney for Gloria LaMotte, actual owner of [the] housing accommodation.

Notice of Appeal at 1.⁴

The Commission held its hearing on the notice of appeal on December 2, 2003.

III. THE COMMISSION'S DECISION ON THE ISSUES

A. Whether the issue of retaliation is within the jurisdiction of the Landlord Tenant Branch, Superior Court of the District of Columbia.

³ The regulation provides, "[f]ailure of a hearing examiner to act on a motion for reconsideration within the time limit prescribed by § 4013.2[,], ten (10) days after receipt[,] shall constitute a denial of the motion for reconsideration." 14 DCMR § 4013.5 (1991).

⁴ The Commission rephrased the tenant's issues, for clarity, in Section III of the Commission's decision.

The tenant stated in the notice of appeal, that issues of retaliation are not considered under the jurisdiction of the Landlord/Tenant court. The District of Columbia Court of Appeals acknowledged that the Superior Court of the District of Columbia had jurisdiction over retaliation when it held that a tenant is “entitled to present evidence regarding appellee’s [the housing provider’s] alleged retaliatory actions.” DeSzunyogh v. William C. Smith & Co., Inc., 604 A.2d 1, 11 (D.C. 1992). Therefore, the Commission and the Superior Court have concurrent jurisdiction over matters of retaliation under the Act, D.C. OFFICIAL CODE § 42-3505.02 (2001). See H. G. Smithy Co. v. Arieno, TP 23,329 (RHC June 5, 1996) at 5.⁵ In Arieno, the Commission determined that the tenant/petitioner was precluded from proceeding in the agency with her retaliation claim, because she pleaded retaliation in the Superior Court. Id. at 6.

In the instant case, the tenant filed a counterclaim in the Superior Court alleging, among other things, “[t]he Landlord is taking retaliatory action against tenant by seeking possession of real property for non-payment of rent and unauthorized changes to property.” Lane v. Nichole, TP 27,733, R. at 31. The Tenant raised the same issue in the tenant petition where she alleged, “[r]etaliatory action has been directed against me/us by my/our Housing Provider....” R. at 19.⁶ The Superior Court accepted jurisdiction over the retaliation issue when it scheduled the case, L&T 000987-03, to be heard on May 28, 2003 in the Landlord and Tenant Branch.

⁵ Arieno is an Order by the Commission on a motion to dismiss. The Commission dismissed one tenant’s claims because she was precluded by res judicata; however, the remaining party was allowed to proceed with his petition because he was not a party to the Superior Court action in which his co-petitioner pleaded the same issue.

⁶ Retaliatory action is the only allegation against the Housing Provider in the tenant petition.

As previously indicated, the Commission and the Superior Court have concurrent jurisdiction over issues of retaliation as related to rental housing. The tenant pleaded retaliatory action by the Housing Provider in both venues. The Housing Provider filed the complaint for possession in the Superior Court on January 13, 2003. The tenant filed in RACD the petition on retaliation on January 24, 2003, and the hearing was held on March 12, 2003. Based on the filing dates, the Superior Court accepted jurisdiction over the retaliation issue prior to the filing of the same issue in the RACD. Therefore, it was not improper for the Rent Administrator to defer to the Superior Court concerning the retaliation issue. Accordingly, the hearing examiner is affirmed on the dismissal of the retaliation claim.

B. Whether the hearing examiner erred when he based his decision upon documents submitted post hearing.

C. Whether the hearing examiner erred when he determined the housing provider was registered at the inception of the lease.

The Tenant wrote in the notice of appeal that her lease started April 1, 2002, and she was in possession of the rental unit on that date. The tenant noted from the Evidence and Pleadings Considered section of the decision that both the Housing Provider's copy of the Registration Form and the copy of the Certificate of Occupancy were dated April 15, 2003, which is one year after the Tenant began occupancy of the property. Decision at 3. These documents are dated after the March 12, 2003 hearing. In addition, the Tenant wrote in the notice of appeal that she has in her possession a letter from the

RACD that the Housing Provider was in violation of the Act, because the housing accommodation was not registered on the date of the inception of the lease.⁷

Hearing Examiner Bradford made the finding of fact and conclusion of law that the Housing Provider had properly registered the rental unit, and that the rental unit was exempt from the rent control provisions of the Act. See Decision at 4. The decision stated that the evidence and pleadings considered consisted of the following:

The following documents submitted by Respondent at the hearing:

Respondent's Exhibit #1: Copy of Registration dated April 15, 2003;

Respondent's Exhibit #2: Copy of Certificate of Occupancy dated April 15, 2003;

Id. at 3.

The Commission must review the record for a determination of whether the substantial evidence in the record supported the findings of fact of the hearing examiner."⁸ Hagner Mgmt. Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999). However, the relevant evidence to be reviewed, R. Exh. 1 and 2, are not in the official record. The documents are not in the file certified to the Commission from the RACD, and not listed on the Rental Accommodations Office Case Docket sheet in the certified file, which lists the title of all documents in the certified file. The lack of documentary evidence in the record may be explained by the fact that the two missing documents are dated one month after the hearing record officially closed on March 12, 2003, the date of the hearing.

Decision at 4.

⁷ The Commission reviews the official hearing record, not documents in the possession of one party. D.C. OFFICIAL CODE § 2-509(c) (2001).

⁸ See D.C. OFFICIAL CODE § 42-3502.16(h) (2001).

The date that the Housing Provider filed the Registration Form and the Certificate of Occupancy with RACD is important to the Commission's review. The DCCA held, "[a]n administrative decision should rest solely upon evidence appearing in the public record of the agency proceeding. New evidence submitted post hearing may not be submitted into the record, and therefore, may not provide a basis upon which an agency may issue a decision." Harris v. District of Columbia Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986).

The OAD hearing was held March 12, 2003. In the decision, Hearing Examiner Bradford refers to documents dated April 15, 2003.⁹ As this date is one month after the hearing, the Housing Provider could not possibly have submitted the documents at the hearing. Indeed, both the Housing Provider and the Tenant claim that the documents were not submitted into the official record during the hearing. Therefore, the Commission concludes from their absence in the official record, that R. Exhs. 1 and 2, were submitted post-hearing, if submitted at all. Post-hearing submissions violate the rules in the Harris case, where the court held evidence submitted post-hearing may not be the basis of a decision.

Following careful review of the record, the Commission is unable to find any evidence that supports the hearing examiner's finding that the housing accommodation at issue is exempt from rent control. The Housing Provider had the burden of proof and failed to meet the burden of proof at the hearing on the registration and exemption issues. See Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007 (D.C. 1987);

⁹ The Housing Provider and the Tenant assert that the Registration Form to which the Hearing examiner refers is actually dated December 2002. RHC Hearing CD. However, the Commission declines to entertain this issue, because the official record does not contain any Registration Form, dated December 2002, or April 2003, and submitted into evidence.

Remin v. District of Columbia Rental Hous. Comm'n, 471 A.2d 275, 279 (D.C. 1984); N Street Follies v. Lewis, TP 21,759 (RHC Dec. 4, 1991) at 4. The only evidence on the registration issue shows the Housing Provider failed in meeting the burden of proof. The official record contains a letter submitted by the Tenant from the Office of the Rent Administrator dated November 5, 2002. This letter states, “[t]he landlord also failed to properly register his property with the Office of the Rent Administrator.” R. at 5.

“The Rental Housing Commission may reverse...any decision of the Rent Administrator which it finds to be ... unsupported by substantial evidence on the record of the proceedings before the Rent Administrator....” D.C. OFFICIAL CODE § 42-3502.16(h) (2001). The Commission determines that the record evidence does not support the hearing examiner’s conclusion that the property was properly registered and exempt from the rent control provisions of the Act. As such, the Commission reverses the hearing examiner’s findings of fact numbered 3 and 4, and conclusion of law numbered one (1), which stated the Housing Provider properly registered the housing accommodation and the property was exempt from rent control.

D. Whether the hearing examiner committed error when he found that Nettie Nichols was the owner of the housing accommodation.

The tenant asserted in the notice of appeal, “[t]hat Nettie Nichols is not the owner of the housing accommodation located at 308 Oglethorpe Street, NE [sic], Washington, DC [sic] 20011. She is [sic] the Power of Attorney for Gloria LaMotte, [who is the] actual owner of [the] housing accommodation.” Notice of Appeal at 1.

The Hearing Examiner made finding of fact number 2 that Nettie Nichols is the owner of the rental unit at issue in the present petition. Decision at 4. The Act defines a

housing provider as “a landlord, an owner, lessor, sublessor, assignee, or their agent, or any other person receiving or entitled to receive rents or benefits for the use or occupancy of any rental unit within a housing accommodation within the District.” D.C. OFFICIAL CODE § 42-3501.03(15) (2001) (emphasis added.) The tenant argues that finding of fact 2 is error because the Hearing Examiner used the wrong term to describe Ms. Nichols.

The official certified record contains a copy of the General Power of Attorney signed by Gloria R. LaMotte in the presence of a commissioned Notary Public for the District of Columbia. R. at 28-29. That document names Nettie B. Nichols as Ms. LaMotte’s attorney (agent) and giver her express authority “2. to request...collect, receive, hold and possess, all such sums of money, debts,...checks...pertaining to personal or real property, as now are...owned by...or belong to me....” Id. at 29. In addition, the tenant readily acknowledges that Ms. Nichols is Ms. LaMotte’s agent. CD Recording (RHC Dec. 2, 2003).

The official record also contains a copy of the lease agreement signed and entered into by the tenant. R. at 7-14. Section 5 of the lease agreement outlines provisions for payment of rent for the unit. That section states, “[r]ent shall be payable to Nettie Nichols....” Id. at 14. Based upon these facts, the Commission determines that Nettie Nichols is a housing provider for the rental unit under the provisions of the Act. She is the agent for the owner, Gloria LaMotte, and she collected rent for the unit at all times relevant to this petition.

The Hearing Examiner committed error by finding Nettie Nichols was the owner of the housing accommodation in his decision. Ms. Nichols’ correct title is housing provider. However, the Commission determines that the error was harmless, since Ms.

Nichols meets the definition of a housing provider; therefore, she is an appropriate party to the petition.¹⁰ See Ford v. Dudley, TP 23,973 (RHC June 3, 1999) at 9 (finding harmless error where the error does not affect the outcome of the case.) Accordingly, the Hearing Examiner is affirmed.

IV. CONCLUSION

The Commission affirmed the part of the hearing examiner's decision that dismissed and deferred the retaliation claim to the Landlord and Tenant Branch of the Superior Court, where the Tenant filed a counterclaim on retaliation. The Commission reversed findings of fact 3 and 4, and conclusion of law number one (1), that the housing accommodation was properly registered and exempt from the rent control provisions of the Act at the inception of the Tenant's lease. There was a lack of substantial evidence in the official record to support those findings of fact and conclusion of law. The Commission held the hearing examiner committed harmless error when he referred to

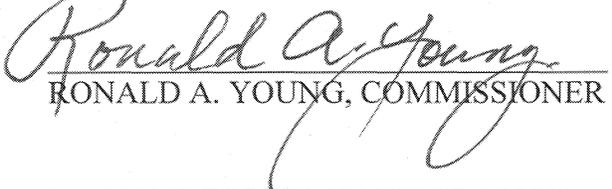
¹⁰ BLACK'S LAW DICTIONARY 543 (6th ed. 1990), defines harmless error as:

[A]n error committed in the progress of the trial below, but which was not prejudicial to the rights of the party assigning it, and for which, therefore, the court will not reverse the judgment, as, where the error was neutralized or corrected by subsequent proceedings in the case, or where, notwithstanding the error, the particular issue was found in that party's favor, or where, even if the error had not been committed, he could not have been legally entitled to prevail. Error which is not sufficient in nature or effect to warrant reversal, modification, or retrial.

Nettie Nichols as the owner of the housing accommodation, rather than referring to Ms. Nichols as the housing provider. Ms. Nichols met the definition of a housing provider, because she was authorized by the power of attorney to accept the Tenant's rent payments.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, 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

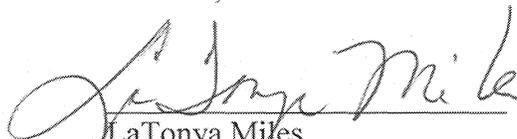
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP27,733 was mailed by priority mail, with confirmation of delivery, postage prepaid this **10th day of August, 2004**, to:

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