DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 10,185

DAISY MARSHALL, Tenant/Appellee

v.

WILLIAM J. DAVIS REALTY, INC., Landlord/Appellant

On remand from the
District of Columbia Court of Appeals
(No. 85-432, September 18,1985)
Decided May 21, 1986

DECISION AND ORDER

Jordan, Commissioner: This matter is before the Commission for the third time, this being the second remand from the Court of Appeals upon the Commission's motion. We requested remand in order to consider, once again, the issues presented in this case. Upon review, we affirm the order of the Rent Administrator, in part, and reverse in part.

Background

On October 5, 1981 Daisy Marshall filed a tenant petition which essentially alleged four violations of the Rental Housing Act of 1980, D.C. Law 3-131, D.C. Code §45-1501 et seq.(1981 ed.). In summary it charged (1) that the landlord had been charging rents which exceeded the legal rent ceiling for the unit in question; (2) that when the tenant moved in on April 8, 1977 electricity was included as part of the mandatory rent charged for the unit, but that

in spite of this the landlord had required the tenant to pay it; (3) that services had been reduced when, starting in the third or fourth week in May, 1981, the air conditioner supplied by the landlord stopped working and remained continuously out of order until August when a new one was finally installed; (4) that services had also been reduced when, approximately eleven months prior to the filing of the petition the oven door had broken, been repaired by the landlord, but had broken again so that the door continually fell off.

A hearing was conducted by hearing examiner Gerald J. Roper. He prepared a decision but it was not issued by him. Instead it was issued as a proposed decision by the Rent Administrator on July 8, 1982, pursuant to the provisions of the D.C. Administrative Procedures Act, D.C. Code §1-1509(d) and the parties were given an opportunity to file exceptions to the proposed order as required by that section. The landlord filed such exceptions, but on February 28, 1983 a final decision was issued by the Rent Administrator rejecting the landlord's objections and adopting the proposed decision as the final decision and order.

The decision dismissed the allegation that the landlord had improperly required the tenant to assume the payment of electricity, finding that such payment had never been included in the mandatory rent. It also dismissed, at least

implicitly, the contention that the continuing defective condition of the stove amounted to a substantial reduction in services. The tenant did not appeal and, therefore, these actions became final.

On the other hand, the decision also concluded that there was no air conditioning from May through July, 1981 and awarded tenant $55.00 per month in damages for the reduction in services for a total of $165.00 plus interest. The landlord appealed both the duration of the loss and the adequacy of the proof to support the monthly amount awarded.

Finally, with regard to the rent and the proper rent ceiling, the hearing examiner performed a complete rent history, based upon his analysis of the landlord registration file, an official file of the Rental Accommodations Office. He disallowed a 5% rent ceiling increase taken in 1976 on the ground that the landlord had not properly completed the required rate of return schedule which determined the rate of increase to which he was entitled. The examiner also determined that on April 1, 1977, just prior to the tenant moving in, the landlord implemented a comparable vacancy increase which he found to be improper. 1/ This determination was

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1/ The hearing examiner did not state the amount of this increase. A review of the landlord registration file suggests that it was $10.00, raising the ceiling from $215.00 to $225.00.

based upon the finding that the landlord registration file described the building at 4950 Benning Road, S.E., where tenant lived, as a multi-unit structure containing 14 units, but which was one of three buildings registered as one housing accommodation having three separate addresses.

The decision noted that the comparable unit upon which the vacancy increase was based was located in one of the other buildings, 4952 Benning Road, S.E. It concluded that such a basis for a vacancy increase was improper under the law, 2/ recalculated the proper ceiling and ordered a rent refund of $702.00 trebled, with interest of $110.57 calculated at 5.25% on the single amount for a total of $2216.57. 3/ In addition, it ordered the landlord to re-register the

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2/ The law cited for this proposition was the Rental Housing Act of 1980, D.C. Law 3-131, D.C.Code §214, §45-1524. The law in effect in April, 1977 when the vacancy increase was taken was actually the Rental Accommodations Act of 1975, D.C. Law 1-33. Section 208 of that Act provided for vacancy increases and, in relevant part, was substantially the same as the 1980 Act. The language of the 1975 Act was, "...[T]he landlord may adjust the rent ceiling for such [vacant] unit to the rent ceiling applicable to any substantially identical rental unit within the same housing accommodation...."

3/ The hearing examiner stated on p.6 of his decision that refunds could only be made for the three year period preceding the filing of the petition on October 5, 1981; however, he actually calculated the refund for the period November 1, 1978 to June 1, 1982. There is no explanation for this discrepancy, but since we reverse on the question of rent overcharges there is no need to obtain a corrected calculation.

three buildings as separate housing accommodations.

The landlord appealed all of these determinations to the Rental Housing Commission, emphasizing the contention that the hearing examiner erred in ruling that a vacancy increase taken on a comparable unit in another building in the complex was improper. 4/ It is this issue, as will be seen, around which all the subsequent proceedings have centered.

The landlord argued on appeal that, at the hearing, the tenant had presented no evidence that there had been a vacancy increase based upon a comparable rental unit in another building. The tenant herself had not testified and her daughter-in-law, who represented her, said only that she was told by people at the Rental Accommodations Office that it looked as though the landlord had been charging too much. Moreover, the landlord said, the petition did not put him on notice that the question of comparables was an issue and therefore his witness had no reason to address it. In addition, it was noted that the hearing examiner also asked no

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4/ On appeal the landlord also asserted that the hearing examiner had committed misconduct by raising the question of settlement discusssions between the parties at the hearingand asking how much the landlord had offered in settlement. No decision was rendered on this contention.

questions concerning it. Instead, the hearing examiner went directly to the landlord registration file which had not been introduced into evidence and, sua sponte, conducted a complete review of its contents which resulted in the determination being appealed from.

The landlord contended that, if he had been put on notice that the issue of comparables was going to be raised, he could have presented evidence that would have constituted a full defense. Under the Commission's decision in Pyne v. Northbrook Apartment Company, TP 325, RAC, April 13, 1977, he said, vacancy increases could properly be taken in multi-building complexes with reference to comparable units in other buildings in the housing complex if an adequate evidentiary showing is made that the complex is sufficiently integrated by common elements of physical makeup, managerial and administrative control, history of being treated as one housing accommodation and the like. He stated that he could have made such showing.

The First RHC Decision

The Commission rendered its decision on January 11, 1984. By a majority vote it affirmed the Rent Administrator's Decision and Order. The majority agreed with the landlord/appellant that the hearing examiner had committed error by taking post-hearing administrative notice of the landlord registration file in violation of the District of

Columbia Administrative Procedures Act, D,C. Code §1-1509(a), which requires that an opportunity must be afforded to all parties to present evidence and argument with respect to contested issues and §1-1509(b), which extends this right to contest to any official notice of a material fact not appearing in the evidence of record.

However, the majority also held, without expressly overruling the Pyne case, or even mentioning it, that the rule is "comparables can only be taken if the units are within the same accommodation. (D.C.Law 3-131, §214)." Presumably the majority was holding, although it did not specifically say so, that under §214 of the Act, D.C. Code §45-1524, a multi-building housing complex could not be a single "housing accommodation" as that phrase is defined in the Act. 5/ Thus, the majority held, the examiner's error in taking notice of the landlord registration file was harmless. Its implicit reasoning was even if the landlord had been permitted to introduce evidence on the question, the result would be the same, because no evidence he could produce could make a difference as a matter of law once it had been shown that the

5/ D.C. Law 3-131, §103(8); D.C. Code §45-1503(8): "(8) 'Housing accommodation' means any structure or building in the District of Columbia containing 1 or more rental units and the land appurtenant thereto. The term 'housing accommodation' shall not include any hotel or inn with a valid certificate of occupancy."

comparable had been taken on another building. 6/

The Commission also affirmed the examiner's findings as to the amount and duration of the award for the reduction in air conditioning services plus interest. The majority added, without explanation, that it was unnecessary to rule on the other grounds of the landlord's appeal. 7/

The landlord's motion for reconsideration was denied and he then appealed to the Court of Appeals. By order dated August 20, 1984 the Court granted the Commission's motion for remand based upon its desire to state the reasons for the apparent difference between its decision and the decision in the Pyne case.

The Second RHC Decision

The Commission issued its order on remand on March 25,

6/ However, it will be noted that, apart from the hearing examiner's post-hearing reliance on the landlord registration file, there was no evidence in the record that the comparable unit used was in another building.

7/ Commissioner Marlin dissented. He would have adhered to the Pyne decision and would have held the examiner to have committed error in ruling without providing the landlord an opportunity to offer evidence on whether the two apartments were substantially identical units in the same housing accommodation. He considered the Commission's action, including the failure to give the landlord a reasoned explanation of its decision, to be a denial of the landlord's due process rights.

1985. The majority explained that §214(B) of the Rental Housing Act of 1980 8/ expressly states that comparables must be based on the rent ceiling of substantially identical rental units in the same housing accommodation. That statutory command, it stated, precludes the allowance of comparisons to units in other buildings in multi-unit complexes even though it was Commission practice to permit landlords of such complexes to file single registration statements and join all of the accommodations in a single hardship petition. The Pyne case was expressly overruled. 9/

Analysis

A.

Although, as discussed, infra, we believe the Rent Administrator's order could be reversed on lack of substantial evidence to sustain petitioner's case regardless of whether

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8/ The reference to § 214(B) is misleading.The referenced language is found in §214(a) of D.C. Law 3-131 as follows: "[T]he rent ceiling may, at the election of the landlord, be adjusted to ...(B) the rent ceiling of a substantially identical rental unit in the same housing accommodation:..." In the codification at D.C. Code §45-1524(a) the designation "(B)" is converted to "(2)".

9/ Once again Commissioner Marlin dissented, elaborating on his opposition to reversal of Pyne as expressed in his earlier opinion. And once again the landlord sought review by the District of Columbia Court of Appeals. The present Commission again moved to remand and the Court, by order dated November 5, 1985 granted the motion.

the Pyne case or the Commission's earlier decisions herein are followed, we nevertheless proceed to a discussion of this substantive controversy. We do this because the issue is central to the case, may remain a continuing issue in future cases if not clarified and, hence, will promote administrative efficiency by explaining the Commission's views on an important question of statutory interpretation.

Section 214(a) of the Rental Housing Act of 1980, D.C. Law 3-131, D.C. Code §45-1524(a) and the corresponding section of the 1975 Act, D.C. Law 1-33 § 208, permits a landlord to increase the rent ceiling of a vacant unit. He can elect to take a flat 10% increase in the existing ceiling or he can raise the ceiling to that of a substantially identical rental unit in the same housing accommodation. The term "substantially identical" is clarified in §214(b), but only in terms of physical criteria. There units are said to be substantially identical when they contain essentially the same square footage, same floor plan, comparable amenities and equipment, comparable locations with respect to exposure and height and are in comparable physical condition.

Clearly, however, mere physical comparability is not sufficient to insure a fair rental comparison if there are other, nonphysical factors affecting the rent of the allegedly comparable unit which are different from those af-

fecting the vacant unit. To be properly comparable it should be under the same ownership and/or control as the vacant unit and under the same managerial scheme so that control of the movement of rents in the two units is related and the use of a given unit as a comparable is validated. Undoubtedly it was such considerations that moved the Council of the District of Columbia to provide in §214(a) that the substantially identical unit selected had to be in the "same housing accommodation."

In Pyne v. Northbrook Apartment Company, T/P 325, RAC (April 13, 1977), the question of comparability was presented in a context where the unit claimed to be comparable was in another building in a complex. Thus, the issue presented was whether "housing accommodation" could include more than one building or structure. The Commission found a number of physical factors that supported comparability: both buildings were of the same size and style of construction, they were constructed at the same time, they had similar facilities and services, a single maintenance crew and shared one heating and hot water plant. On the other hand they were located on separate lots.

With regard to nonphysical factors, the buildings were owned and managed by a single landlord, and their income, expenses and assessments were combined and treated as one in

the landlord's calculation of his rate of return. Moreover, because of the common facilities they could not be sold and operated separately from each other without substantial capital improvements being made. However, they were separately assessed, had separate housing business licenses and certificates of occupancy and were registered as separate accommodations with the Rental Accommodations Office.

The Commission concluded that a review of the existing rent structure did not suggest that the rents in one building were consistently higher than in the other. Thus, when the factors pointing toward both physical and nonphysical integration were compared with those suggesting separateness it was clear the units were substantially identical and that comparability was validated. "In such a situation it defeats the purpose of Section 208 [of the 1975 Act] to consider the two buildings as separate housing accommodations," the Commission held. Accordingly, it permitted the vacancy increase to stand.

However, here, as in two prior cases, 10/ the Commission rejected the reasoning of the Pyne case and held that the

10/ Charles E. Smith Co. v. Cureton, TP 10,774, RHC, (August 30, 1984) (DCCA 84-1397; Quality Management, Inc. v. Reid, TP 11,307, RHC,(February 7, 1985) (DCCA 85-236).

language of §214(a) is a clear and unambiguous statement that the comparable unit has to be in the same building as the vacant unit, and the principle that when the meaning of a statute is plain on its face there is no need to rresort to interpretation or construction applies. We do not agree. We believe the definition suggests that "housing accommodation" embodies three distinct concepts: "structure", "building" and the "land appurtenant to either" each of which differs in some respects from the other. Thus, "structure" and "building" are separated by the word "or". The D.C. Court of Appeals has observed, "The use of the disjunctive conjunction 'or', to join the alternatives, indicates that they are mutually exclusive." Charles E. Smith v. District of Columbia Rental Housing Commission, 492 A.2d 875, 878 (D.C.1985). If it is contended, as the Commission apparently did by implication in its March 25, 1985 decision, that "structure" and "building" are alternative terms for the same entity, the differing constructions themselves suggest that the language is ambiguous enough to remove the matter from the plain meaning rule. "A legislative provision warrants closer scrutiny when its language has only superficial clarity, fails to embody legislative intent or yields absurd or unjust results." Peoples Drug Stores v. District of Columbia 470 A.2d 751; Auger v. District of Columbia Board of Appeals and Review, 477 A.2nd 196, 211-12 (D.C. 1984). Both cited cases contain valuable discussions of the limits of the plain meaning principle.

When, in addition it is noted that the Court of Appeals has also had to resort to interpreting the meaning of the same definition, it is apparent that the plain meaning principle cannot apply. In Feldman v. District of Columbia Rental Housing Commission, 501 A.2d 781 (D.C., 1985), rehearing en banc granted May 24, 1986, the Court was required to interpret the small landlord exemption of both the 1977 and 1980 Acts, both of which exempted from rent control,

> "Any rental unit in any housing accommodation of 4 or fewer units, including any aggregate of 4 units whether within the same structure or not." 11/ (Emphasis added)

The Court said, 501 A.2d 781,784,f.n.5, "The only way to read this language consistent with the grammatical context of either statute is to construe it as requiring each unit in an aggregate of four, 'whether within the same structure or not,' to be in a building containing no more than four units." Thus, both the statutory language and the Court's construction make it at least arguable that a housing accommodation can include more than a single structure. Under those circumstances, the plain meaning rule must yield to the imprecision of statutory language and the realities con-

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11/ D.C. Law 2-54 §205(a)(4); D.C. Code §45-1686(a)(4) (1980 Supp.) and D.C Law 3-131 §206(a)(3); D.C. Code §45-1516(a)(3) (1981 ed).

cerning the wide variety of building construction and ownership arrangements in a city as diverse as the District of Columbia. 12/

Moreover, we note that the same Commission majority that rejected the principle of the Pyne case had previously agreed in another case that "under the appropriate circumstances" a multi-building housing complex can be treated as a single accommodation for purposes of filing a hardship petition. The reference to "appropriate circumstances" was to the same kind of criteria relating to physical and functional integration discussed above. Estate of Hattie Farwood v. Tenants of 3508-12 Ely Place, S.E., HP 10,192, RHC, (April 22, 1983). Moreover, the regulations adopted by that Commission explicitly authorized a single registration for a multi-building

12/ As a result of the Feldman case the Council of the District of Columbia has taken action to eliminate the ambiguity in the phrase "housing accommodation" revealed in that case by amending the 1977, 1980 and 1985 Acts to insure that only the residential condominiumn units owned by persons claiming exemption, and not the building or structure as a whole, should be considered as housing accommodations. Act 6-147, Leased Condominiums Emergency Clarification Amendment Act of 1986, 33 DCR 2016; Resolution 6-582, Leased Condominiums Emergency Declaration Resolution of 1986, 33 DCR 2019; Bill 6-235, D.C. Condominium Act of 1976 Reform Amendments Act of 1985 [sic] 33 DCR 2024 (April 4, 1986). At no time has the Council ever seen fit to alter the definition to overcome the Pyne case although there have been three general revisions of the rental housing law since Pyne.

housing complex, 13/ and, in conjunction with a petition for a hardship adjustment, permitted a landlord to file for a multi-building complex as a whole. 14/

The majority, in its March 25, 1985 decision distinguished the hardship adjustment situation from the present one on the ground that in the former there was no statutory proscription against treating multi-building complexes as one accommodation while in the latter the statute was clear on its face. We have rejected this view. We note also that the present Commission's regulations promulgated March 7, 1986, 33 DCR 1336 and 33 DCR 1484, continue the treatment of multi-building housing complexes in the same manner as under the prior regulations. 15/

For the foregoing reasons we adhere to the rationale and holding of the Pyne case and overrule the Commission's earlier decisions in this case and in the cases cited at f.n.10, supra, insofar as they hold that a landlord may not take a comparable vacancy rent ceiling adjustment based on the rent ceiling of a substantially identical rental unit solely on the ground that the other unit is in another

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13/ 14 DCMR 3402.2 (1984)

14/ 14 DCMR 3502.6 and 3502.7 (1984)

15/ 14 DCMR 4102.3, 4207.4(c), 4208.7, 4208.8.

building in the same housing accommodation. In appropriate circumstances, where the relevant criteria support a finding of congruence of physical and nonphysical factors, such an increase may be proper.

C.

Under the rationale of the Commission in its two prior decisions herein, which we overrule on this issue, all that is required for a tenant to succeed in establishing a violation of §214 is to allege and prove that a vacancy increase based on a substantially identical unit was taken on a rental unit in a building other than the one in which the tenant's unit is located. As a matter of law the landlord can have no defense.

Under the standard now adopted by the Commission a tenant who believes that an improper comparable has been taken must sufficiently allege and prove that a vacancy increase in the rent ceiling was taken based upon a unit in another building. The landlord can then come forward with evidence to establish that he was entitled to take such an increase by showing the various indicia of integration upon which he relies to prove that the multi-building complex should be considered a single housing accommodation. The tenant can rebut this with counter evidence.

We do not put the burden on the tenant in the first

instance to prove that the complex does not constitute a single housing accommodation. Normally it will be the landlord and not the tenant who is in possession of the factual information upon which that showing will be made. Put differently, we treat the question of establishing single housing accommodation status as an affirmative defense to be proven by the respondent.

D.

Having determined the applicable substantive rule and allocated the burden of proof between the parties, it remains to apply these to this case in order to come to a final resolution of the landlord's appeal. The tenant's petition/complaint made no mention at all of an improper vacancy rent ceiling adjustment. It did, however, contain several checked-off boxes relating to rent and rent ceilings. The petition stated that a rent increase had been charged which was larger than any amount allowed by the Act; that the landlord failed to file proper rent increase forms; that the rent being charged exceeds the legally calculated rent ceiling for the unit; that the rent ceiling filed with the Rental Accommodations Office for the unit is improper and that the landlord had violated sections 206, 207, 208, 209, 212 and 217 of the Rental Housing Act of 1980. Section 214 was not specified. The tenant herself gave no testimony, but her daughter-in-law, who acted as her representative, and who may have been sworn (although that is not clear from the tape

recording of the hearing) did make statements on the record.

She said that she had checked with the Rental Accommodations Office and found there was a possibility that the tenants had been charged too much, that rent was increased when it was not supposed to be. In answer to a question from the hearing examiner as to what period of time she was referring to she said that she was really talking about the last two increases although the figures given to her went all the way back to 1977. She stated she was told that the rent should be $267 rather than $294 and that maybe the hearing examiner's office should look into it. The hearing examiner asked no further questions of her and elicited no additional information on the subject.

On two recent occasions this Commission has called attention to the use of rent histories as it relates to the fundamentals of due process to which a respondent is entitled in an administrative proceeding. In Alexander v. Lenkin Company Management, Inc., TP 11,831, RHC, (April 11, 1986) the hearing examiner said at the hearing that the rent ceiling was an issue in all cases before him and proceeded without prior notice to do a rent history at that hearing. We disapproved this procedure stating that in administrative practice, parties are entitled to notice and an opportunity to be heard. If the party has no notice of an issue, that party has not had that opportunity.

Here the hearing examiner, after the conclusion of the hearing, took official notice of the landlord registration file and did a full rent history in the course of which he discovered, and considered as evidence, the vacancy increase taken on the basis of another building in the complex. The question, then, is whether the landlord had fair notice that the propriety of the vacancy increase was a contested issue upon which he was entitled to be heard by the D.C. Administrative Procedures Act, D.C. Code §1-1509 (1985 Supp.). We find he did not. The boxes checked on the petition/complaint gave no hint that such issue was being presented and the recitation of sections of the Act the tenant claimed had been violated, although lengthy, failed to mention the one section which dealt with that subject matter. It is true that in modern administrative practice pleadings may be loose and filled in with adequate proof so long as the party can be said to be "reasonably apprised" of the issues in controversy. L.G. Balfour Company v. FTC, 442 F.2d 1,19 (7th Cir., 1971); 3 K. Davis, Administrative Law §14.11 (2nd ed.,1980). Also proof may depart from the pleadings and pleadings may be amended to conform to proof if undue surprise is avoided. NLRB v. Mackay Radio and Tel. Co. 304 U.S. 333, 350 (1938). But here neither the petition/complaint nor the tenant's proof separately or taken together reasonably apprised the landlord that the vacancy increase was an issue or that she was relying on, or attempting to offer into evidence, the landlord registration file, even if it is assumed that the

statements of the tenant's daughter-in-law amounted to direct testimony. In Thompson v. Yavalar, TP 11,188, RHC, (April 11, 1986) we stated that the petitioner must meet the burden of proof of presenting sufficient credible evidence to cast reasonable doubt on the accuracy or legality of the ceiling to justify a full rent history. Here that has not been done.

Accordingly, all that is left of the tenant's evidentiary case is the hearing examiner's post-hearing official notice of the landlord registration file which was improperly admitted under the law. Carey v. District Unemployment Compensation Board, 304 A.2d 18 (D.C. 1973). We therefore reverse the Rent Administrator's Order and the Decision on which it was based to the extent that it concluded the landlord had charged rent in excess of the rent ceiling for tenant's unit for the period November 1978 through May, 1982.

E.

The landlord also challenges the duration of the loss of air conditioning and the adequacy of the proof of damages for that loss as well as the award of interest thereon. We find there was substantial evidence supporting the award of damages in the amount of $165.00. We also approve the award of interest on that amount. Hinton v. Moser, TP 2774, RHC, (April 2, 1986). However, the interest calculation of $8.66 is in error because the principal amount of $165 was multi-

plied by the full annual rate of 5.25% and not by the fractional part of the year rerpresented by the three months for which the damages were awarded. The correct interest should be $2.15.

Finally we deny the appeal on the point that the hearing examiner committed misconduct by referring to settlement talks and asking about the amount offered in settlement. Landlord made no showing that either party was prejudiced by that brief reference.

We affirm the Rent Administrator's Order in all other respects, and direct that the damages of $173.66 for the loss of air conditioning to be paid by landlord to tenant be amended to $167.17.

Belva D. Newsome, Chairperson

Daniel B. Jordan, Commissioner

Isaiah T. Creswell, Jr., Commissioner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was placed in the District Government mailing system to the parites named above at the addresses given, on this 21st day of May, 1986. The time for appeal begins to run three (3) business days following the postmark date on the envelope transmitting this Decision.

N. Stephenson