DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,663

In re: 2625 Naylor Road, S.E.
Unit 201

Ward Eight(8)

WILLIAM C. SMITH COMPANY
Housing Provider/Appellant

v.

CHRISTINE MILLER
Tenant/Appellee

DECISION AND ORDER

June 28, 2000

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), pursuant to the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. Code § 45-2501 et seq., and the District of Columbia Administrative Procedure Act (DCAPA), D.C. Code § 1-1501, et seq. The regulations, 14 DCMR 3800 et seq., also apply.

I. PROCEDURAL HISTORY

Christine Miller, the tenant/appellee, filed Tenant Petition 24,663 (TP 24,663) with the Rental Accommodations and Conversion Division (RACD) on February 8, 1999. The petition

concerned the housing accommodation at 2625 Naylor Road, S.E., unit 201. In the petition, the tenant alleged that her housing provider, William C. Smith & Company, Inc. (Smith & Company): (1) increased the rent while her unit was not in substantial compliance with D.C. Housing Regulations; and (2) either permanently eliminated or substantially reduced the services and facilities provided in connection with her rental unit.

On May 6, 1999, Hearing Examiner Gerald J. Roper convened the adjudicatory hearing. The tenant appeared pro se. The housing provider was neither present nor represented. Therefore, the hearing was held in the respondent's absence.

Hearing Examiner Roper issued the decision and order on December 16, 1999. He concluded that there was a substantial reduction in the services and facilities of Christine Miller's rental unit, based on the housing provider's failure to repair housing code violations existing in her unit. The hearing examiner also found that the March 1, 1999 rent increase was taken while the tenant's unit was not in substantial compliance with the D.C. Housing Regulations. The hearing examiner ordered that the tenant was entitled to a rent refund and rent rollback, and awarded a refund of $2653.00 plus $75.00 interest.

Smith & Company filed a motion for reconsideration and/or motion to vacate on January 4, 2000. The motion, which was not

decided within ten (10) days by the hearing examiner, was deemed denied. See 14 DCMR 4013.5.

On January 28, 2000, Smith & Company timely filed the instant appeal from the December 16, 1999 OAD decision. The Commission held the hearing on appeal on March 9, 2000. During the initial hearing on appeal, Christine Miller was granted a continuance until April 3, 2000 to obtain a legal representative. She was unable to do so and represented herself at the April 3, 2000 hearing held by the Commission.

II. ISSUES ON APPEAL

In the notice of appeal, the housing provider, through counsel, challenges the failure of the hearing examiner to give the housing provider an opportunity to be heard on the merits. The housing provider alleged: (1) it had no knowledge that Christine Miller filed a tenant petition until a representative of the housing provider received a copy of the hearing examiner's decision and order on December 22, 1999; and (2) it filed a timely motion for reconsideration/motion to vacate, which was based on good faith defenses. The housing provider requests that the Commission vacate the decision and order of the hearing examiner and remand the matter for a hearing on the merits.

III. DISCUSSION

Whether the hearing examiner erred in rendering a default judgment.

It is a well-established principle that a party who fails to appear at a hearing before the Rent Administrator lacks standing to appeal from decisions that were rendered at that hearing. See John's Properties v. Hilliard, TP 22,269 and TP 21,116 (RHC June 24, 1993) (citing Delevay v. District of Columbia Rental Accom. Comm'n, 411 A.2d 354 (D.C. 1980)). An exception to this rule occurs when a party alleges that he or she did not receive notice of the hearing. The exception is based on the strong policy favoring trials on the merits. See Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478, 481 (D.C. 1996).

The District of Columbia Court of Appeals has identified the following four factors that the Commission must consider in order to determine whether to set aside a default judgment: (1) whether the movant received actual notice of the proceeding; (2) whether the movant acted in good faith; (3) whether the movant acted promptly; and (4) whether the movant presented a prima facie adequate defense. Prejudice towards the non-moving party must also be considered. See Radwan, 683 A.2d at 481 (citing Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979)).

Furthermore, the Act specifically requires service of notice of hearings by certified mail or other method that assures delivery at least 15 days before the commencement of the hearing. See D.C. Code § 45-2526(c). The Act further provides:

> The Rental Housing Commission may reverse, in whole or in part, any decision of the Rent Administrator which it finds to be arbitrary, capricious, an abuse of discretion, not in accordance with the provisions of this chapter, or unsupported by substantial evidence on the record of the proceedings before the Rent Administrator, or it may affirm, in whole or in part, the Rent Administrator's decision.

D.C. Code § 45-2526(h)(emphasis added).

1. Whether the Movant Received Actual Notice of the Proceeding

As previously stated, the first factor under the Radwan test is whether the movant received actual notice of the proceeding. If the agency properly mailed the item, then there is a presumption that the item was received. See John's Properties (RHC June 24, 1993)(citing Tenants of 3140 Wisconsin Ave., N.W. v. Kent, CI 20,013 (RHC May 26, 1986); Foster v. District of Columbia, 497 A.2d 100, 102 n.10 (D.C. 1985); Allied Am. Mut. Fire Ins. Co. v. Paige, 143 A.2d 508, 510 (D.C. 1958)).

In the decision and order, the hearing examiner stated that Smith & Company received proper notice of the hearing in accordance with Section 216 of the Act, D.C. Code § 45-2526(c). See Miller v. William C. Smith Co., TP 24,663 (OAD Dec. 16, 1999). However, in the instant case, the housing provider

claims first, that it did not receive a copy of the tenant petition, and second, that it did not receive the OAD notice of the hearing scheduled for May 6, 1999. See Record (R.) at 31.

The official notice of hearing does not indicate that a copy of the tenant petition was attached to the notice. "In the case of tenant petitions, a copy of the petition shall be sent to the housing provider of the housing accommodation." 14 DCMR 3902.4. Since OAD did not attach a copy of the tenant petition to the notice of hearing, OAD is in violation of due process of law.[1]

The Commission reviewed the record in order to determine whether OAD provided the housing provider with proper notice of the May 6, 1999 hearing. When the Commission reviewed the record, the Commission noted that the tenant petition contained the following address for the housing provider: "William C Smith Co, [sic] 1220 L Street N.W. #300." (R. at 9.)

On April 7, 1999, OAD addressed the official notice of the May 6, 1999 hearing to the following: "William C. Smith Co, 1220 L Street, NW #300, Washington, DC." [sic] (R. at 21.) The

[1] Pursuant to D.C. Code § 45-2526(c), the Commission hereby orders the Rent Administrator to mail a copy of the tenant petition to Smith & Company and to amend the language in the notice of hearing to indicate that a copy of the tenant petition is enclosed with the notice. This order is based on the lack of substantial evidence in the record that the tenant petition was mailed to the housing provider.

certificate of service on the notice was signed by the Chief Administrative Law Judge, dated April 7, 1999, and was addressed in the same manner as stated supra. (R. at 20.) The tenant petition, notice of hearing, and certificate of service did not include a zip code for the housing provider. In addition, the OAD notice of hearing used an address other than the one the housing provider used on its agency filings.

The certified OAD record includes a total of two receipts for certified mail, one properly addressed to Smith & Company with their zip code and the other properly addressed to Christine Miller. The receipt that provides the address of the housing provider correctly states the zip code, which is verified by the address listed on the housing provider's stationery. The document containing the housing provider's correct address was introduced as evidence of a rent increase at the May 6, 1999 hearing, by Christine Miller, and is labeled "P-1" in the record. The label "P-1" indicates the petitioner's first exhibit. See (R. at 19.). The zip code listed on the housing provider's stationery is "20005."

Once the Commission noted the absence of a zip code in the record, the Commission consulted the United States Postal Service, Maryland and Washington, D.C. Zip Code Directory. The Commission takes official notice that the United States Postal

Service designated "20005" as the correct zip code for 1220 L Street, N.W., which is the housing provider's address.[2]

Nonetheless, the presence of only two certified mail receipts in the OAD certified record, and not four, and the absence of any domestic return receipts, which verify that the documents were received by the parties, provides substantial evidence of defective service on the part of OAD. In addition, the mail receipts do not state the date that the documents were sent, nor do they identify the documents that were sent to the parties. Therefore, the two receipts could have been either for the notice of hearing, or the decision and order, as both of these documents are enclosed in the certified record and include certificates of service, verifying that each party was sent a copy. Accordingly, the form of service that the notice of the

[2] The Commission takes official notice of the United States Postal Service, Maryland and Washington, D.C. Zip Code Directory. This action is taken pursuant to the District of Columbia Administrative Procedure Act (DCAPA), D.C. Code § 1-1509(b), which provides that where the decision of an agency in a contested case rests upon official notice of a material fact not appearing in the evidence in the record, any party to such a case, upon timely request, shall be afforded an opportunity to show the contrary. In accordance with D.C. Code § 1-1509(b), the parties have ten (10) days from the date of this decision to show facts contrary to those found in the United States Postal Service, Maryland and Washington, D.C. Zip Code Directory.

OAD hearing was sent is not one that assures delivery, pursuant to D.C. Code § 45-2526(c).

Furthermore, Ana Channell, Vice President of Smith & Company, has submitted a sworn affidavit stating the following:

> The first time I knew about the tenant petition filed by Petitioner was on December 16, 1999, when I received the Decision and Order in T/P 24,663 . . . I have never received a copy of the tenant petition nor did I receive any notice of the hearing date.

(R. at 23-25.) The Commission recognizes that, because of its self-serving nature, the housing provider's affidavit, alone, is insufficient to rebut the presumption of receipt. See John's Properties (RHC June 24, 1993) (citing Wofford v. Willoughby, HP 10,687 (RHC Apr. 1, 1987)). However, the substantial evidence in the record, in conjunction with the affidavit of Channell, strongly indicates that Smith & Company was not served notice of the hearing.

The agency, which must strictly adhere to the notice requirements of the Act, (see Parkwell Assoc. v. Bikoy, TP 24,383 (RHC Dec. 30, 1999) (citing Ungar v. District of Columbia Rental Hous. Comm'n, 535 A.2d 887, 890 (D.C. 1987)), failed to send notice of the May 6, 1999 hearing to the housing provider's correct address. "The failure to give proper notice is a violation of due process. A 'hearing' begins with '[n]otice of the proposed action and the grounds asserted for it.'" Dias v.

Perry, TP 24,379, (RHC Dec. 27, 1999) (quoting Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 9.5, (3rd ed.) p. 47).

In Parkwell Assoc., the Commission stated that OAD failed to deliver notice of the hearing to the housing provider's correct address, zip code "20011" not "20001." Therefore, the Commission concluded that OAD erred because there was no proof in the record that notice of the hearing was sent by certified mail or another form of service that assured delivery, pursuant to D.C. Code § 45-2526(c). The instant case results in the same conclusion as Parkwell Assoc. and Dias, that the housing provider was not properly served notice of the hearing.

In the absence of proper notice of the hearing, the other three Radwan factors are considered moot, and therefore do not require further discussion.

IV. CONCLUSION

The substantial evidence in the record indicates that the agency failed to deliver by certified mail a copy of the tenant petition to Smith and Company, pursuant to 14 DCMR 3902.4. The Rent Administrator is directed to deliver by certified mail a copy of the tenant petition to Smith & Company and to change the language on the notice of hearing in order to indicate that a copy of the tenant petition is attached to the notice.

Moreover, the substantial evidence in the record indicates that the agency failed to send notice of the May 6, 1999 hearing to the housing provider's correct address, and that the agency further failed to send notice by certified mail or through another form of service that assured delivery. The housing provider did not receive notice of the hearing, pursuant to D.C. Code § 45-2526(c). Therefore, the OAD decision is reversed and this case is remanded to OAD for a hearing de novo, based on the failure of OAD to send the hearing notice by certified mail or other method that assured delivery.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 24,663 was mailed by certified mail postage prepaid this **28th** day of June 2000 to:

Joanne Sgro, Esquire
1750 K Street, N.W.
Suite 800
Washington, D.C. 20006

and

Christine Miller
2625 Naylor Road, S.E.
Apartment 201
Washington, D.C. 20020

LaTonya Miles
Contact Representative