DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,777

In re: 3869 Alabama Avenue, S.E., Unit 203

Ward Seven (7)

ALEXANDRA CORPORATION
Housing Provider/Appellant

v.

LORRAINE E. ARMSTEAD
Tenant/Appellee

DECISION AND ORDER

August 15, 2000

PER CURIAM: This case is on appeal from a decision of 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 BACKGROUND

On July 27, 1999, Lorraine Armstead filed Tenant Petition (TP) 24,777 against Alexandra Corporation, the owner of the housing accommodation located at 3869 Alabama Avenue, S.E., Unit 203. In the petition, the tenant alleged the following: [A] rent increase was taken while the unit was not in substantial compliance with the D.C. Housing Regulations; the building where the rental unit was located was improperly registered with RACD; the services and facilities provided in connection with the rental

unit were substantially reduced or permanently eliminated; coercion of the tenant by the housing provider, manager or other tenants to obtain signatures on a Voluntary Agreement, which was filed with the Rent Administrator; and retaliation directed against the tenant, by the housing provider, in violation of section 502 of the Act . See Record (R.) at 7-8.

An OAD hearing was scheduled for August 18, 1999, but was rescheduled by OAD to occur on September 23, 1999. See (R. at 11, 66.) The housing provider, the appellant in the current proceedings, did not appear at the rescheduled hearing on September 23, 1999 before the Rent Administrator, nor was it represented. Therefore, the rescheduled hearing was held in the housing provider's absence.

On January 12, 2000, Hearing Examiner Gerald J. Roper issued the OAD decision and order. As a preliminary matter, the hearing examiner noted, "[n]otice of the date, time and place of the hearing was furnished to the parties in accordance with Section 216 of the Act, D.C. Code Ann. Section 45-2526(c) (1986)." Armstead v. Alexandra Corp., TP 24,777 (OAD Apr. 10, 2000). The hearing examiner then made the following findings of fact:

1. The subject housing accommodation, 3869 Alabama Avenue [sic] is registered with the RACD.
2. The Respondent has a proper Housing Business License for the subject housing accommodation.
3. Respondent increased [sic] Petitioner's rent by 1% on April 1, 1999.
4. Petitioner had five substantial housing code violations in the bedroom ceiling in April 1999.
5. A rent increase was not [sic] taken while the Petitioner's rental unit was not in substantial compliance with the D.C. Housings [sic] regulations.
6. Respondent did substantial [sic] reduce the maintenance and repair service to the Petitioner. However, because the rent charged plus the value of the reduction [sic] does not exceed the rent ceiling there is no rent refund.

7. The Respondent retaliated against the Petitioner by substantially reducing the related maintenance and repair services and facilities and shall be fined $75.00 [sic]

Id. at 11-12. Based on the evidence presented, the hearing examiner concluded as a matter of law:

1. The Respondent has reduced the services and facilities of the Petitioner in violation [of] D.C. Code Section 45-2521 however, there is no reduction or refund of the rent because the value of the rent reduction did not exceed the rent ceiling.
2. The Respondent has retaliated against Petitioner in violation of D.C. Code Section 45-2552 (1990).
3. The Respondent shall be fined for the above violations in accordance with the penalties provisions of D.C. Code [sic] 45-2591.

Id. at 12.

The hearing examiner ordered the following: (1) "[T]he respondent shall cease and desist from any further retaliatory action against Petitioner and seeking to evict the Petitioner without giving proper notice; and (2) [t]he Respondent, Alexander [sic] Corporation is liable for the violation of 14 DCMR 4205.4, 4205.5, and D.C. Code Section[s] 45-2551, 45-2552. A fine of $750.00 will be imposed." Id. at 13.

Alexandra Corporation filed a timely motion for reconsideration with the Office of Adjudication on January 28, 2000. The motion, which was not decided within ten (10) days by the hearing examiner, was deemed denied by operation of law. See 14 DCMR 4013.5.

On February 25, 2000, Alexandra Corporation filed in the Commission the instant notice of appeal from the January 12, 2000 decision. The Commission scheduled the hearing for April 6, 2000. However, on March 17, 2000, the Commission ordered that OAD re-mail its decision and order, date-stamped January 12, 2000, to Armstead using the address that she stated as her mailing address at the OAD hearing. Therefore, OAD

mailed the Amended Decision and Order by certified mail to the parties on April 10, 2000. The Commission hearing was rescheduled and held on July 12, 2000.

II. ISSUES ON APPEAL

On appeal to the Commission, appellant Alexandra Corporation argues first, that the hearing examiner made a numerical error in his order of the fine levied against the housing provider. Second, the housing provider argues that the hearing examiner improperly applied the law because "[t]he issues raised by the petition were duplicative of those already litigated in D.C. Superior Court . . . Thus, the petition should have been dismissed." Notice of Appeal (N.) at 1. Third, the housing provider contends that the "tenant petition herein (T/P 24,777) was the second one involving the same subjects. The prior petition, T/P 24,705 [sic] had been dismissed because the same issues were being litigated in the D.C. Superior Court action (L/T 18198-99) [sic] Thus, this petition should likewise have been dismissed." (N. at 1-2.)

The housing provider next argues that the order of the hearing examiner resulted from an ex parte hearing, and "the same issues had been raised in a prior tenant petition and had been litigated at trial in court with a decision in favor of the housing provider." (N. at 2.) In addition to this argument, the housing provider argues that the hearing before the hearing examiner was rescheduled, however, the Order did not state the date that the rescheduled hearing would take place. Furthermore, the housing provider argues that the examiner should have "taken notice of his own agencies records," because a prior tenant petition was dismissed by the agency and litigated in D.C. Superior Court. Id. As relief, Alexandra Corporation prays that the decision and order below be reversed and that the tenant petition be dismissed with prejudice. Id.

III. PROCEDURAL ISSUE

A. Whether a party against whom a default judgment was entered in the Rent Administrator's decision and order has standing to appeal.

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 (DCCA) 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. See Radwan, 683 A.2d at 481 (citing Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979)). During the hearing before the Commission on July 12, 2000, the appellant, Alexandra Corporation, stated that it received actual notice of the hearing. Therefore, the appellant cannot pass the threshold inquiry of the Radwan test in order to gain standing on appeal. That is, the housing provider received actual notice of the hearing.

Despite the fact that appellant cannot pass the Radwan test mentioned supra, in Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 855 (8th Cir. 1996), the court held that a judgment by default was within the constructs of Rule 55(b) of the Federal Rules of Civil Procedure, a rule which is identical to the D.C. Super. Ct. Civ. R. 55(b) [hereinafter R. 55(b)], and was therefore considered to be a final judgment, which could

be appealed immediately. In other words, applying 14 DCMR 3828.1, default judgments are final judgments, which, contrary to Radwan, can be appealed.

The Commission can apply R. 55(b) of the D.C. Superior Court Civil Rules mentioned supra, through 14 DCMR 3828.1. The Commission's rule, 14 DCMR 3828.1 states:

> When these rules are silent on a procedural issue before the Commission, that issue shall be decided by using as guidance the current rules of civil procedure published and followed by the Superior Court of the District of Columbia and the rules of the District of Columbia Court of Appeals.

45 D.C. Reg. 3828.1 (1998).

Section 17 of the Restatement (Second) of Judgments establishes that a claim may arise on the judgment and states the following: "[A] valid and final personal judgment is conclusive between the parties, except on appeal . . . to the following extent: (1) if the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment." Shin v. Portals Confederation Corp., 728 A.2d 615, 624 (D.C. 1999). Furthermore, Section 18 of the Restatement (Second) of Judgments establishes that a plaintiff may be able to maintain an action on the judgment. Section 18 states, "when a valid and final personal judgment is rendered in favor of plaintiff: (1) the plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment." Id. at 624 (emphasis added). In other words, the term "judgment" encompasses any remedies or damages that the trial court ordered and excludes liabilities.

The cases of Firestone v. Harris, 414 A.2d 526 (D.C. 1980), and Lockhart v. Cade, 728 A.2d 65 (D.C. 1999), illustrate and establish a defendant/appellant's right to an appeal, despite a default judgment entered by the court below. In Firestone, a default

judgment was entered against appellant for failure to comply with the trial court's discovery order. See Firestone, 414 A.2d at 527. A hearing was held in order to determine damages, wherein "appellee testified and presented two expert witnesses, but appellant was not allowed to cross-examine them." Id. On appeal, appellant argued, inter alia, that the trial judge erred when it denied her request to participate in the hearing on damages. Id. Appellant successfully appealed on the basis of the claim concerning damages. On appeal, the DCCA held "[a]n entry of default in a claim for unliquidated damages admits only the nondefaulting party's right to recover, not the amount of damages." Id. at 528 (citing 6 Moore's Federal Practice ¶ 55.07 (1976)). Therefore, the DCCA remanded the case for a new hearing, because appellant was denied the opportunity to participate in the damages hearing. See id. at 528.

As mentioned supra, the "rule of merger extinguishes the plaintiff's claim and replaces it with the judgment, precluding a successful plaintiff from seeking other remedies based on the extinguished claim." Shin, 728 A.2d at 623. It has been established that a party can bring a claim based on the judgment itself; however, a claim cannot be brought on an entry of default, which is not considered a judgment, whereas a claim can be brought on a judgment by default, which is considered a judgment.

Rule 55(b)(1) describes a judgment by default entered by the clerk and provides: "[W]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the plaintiff shall have filed a complaint verified by the plaintiff or by the plaintiff's agent . . . the Clerk . . . shall enter judgment for that amount and costs against the defendant." Super. Ct. Civ. R. 55(b)(1) (emphasis added).

> In all other cases the party entitled to a judgment by default shall apply by motion to the Court therefor . . . If, in order to enable the Court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the Court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any applicable statute.

Super. Ct. Civ. R. 55(b)(2). A default judgment "is a final judgment that terminates the litigation and decides the dispute." Lockhart, 728 A.2d at 68. The distinction between the entry of default and judgment by default, for our purposes, is that "the entry of a default does not constitute a judgment, but simply precludes the defaulting party from offering any further defense on the issue of liability." Id. (citing Clark v. Moler, 418 A.2d 1039, 1042 (D.C. 1980)). Final judgments, such as judgments entered pursuant to 55(b)(1) are appealable immediately, whereas the mere entry of a default pursuant to 55(a), is not a "judgment" and therefore is not immediately appealable.

In Alexandra Corp. v. Armstead, TP 24,777 (OAD Apr. 10, 2000) a final judgment, which closely resembles a 55(b)(1) judgment by default, was entered in the plaintiff's favor by the Rent Administrator. Therefore, the appellant, Alexandra Corporation, was permitted to appeal the judgment based on an alleged error related to damages, despite the default judgment entered against it by the Rent Administrator. The appellant has standing to appeal, because the judgment entered against Alexandra Corporation by the Rent Administrator closely resembled R. 55(b)(1) and not R. 55(a). The circumstances of this case closely resemble a judgment by default entered by the clerk, based on Alexandra Corporation's failure to attend the hearing, a judgment by default was entered by the Rent Administrator, a full hearing was held, absent the housing provider, and the plaintiff's claim in the court below was for a "sum which can

by computation be made certain." Super. Ct. Civ. R. 55(b)(1). The judgment by default was a valid and final personal judgment and it was rendered in favor of the plaintiff. Therefore, the plaintiff's claim became extinguished and merged in the judgment and a new claim could arise on the judgment. Based on the law, the appellant, Alexandra Corporation, has standing to appeal the amount of the default judgment, but does not have standing to appeal liability based on its default.

IV. DISCUSSION OF THE CASE

A. Whether the hearing examiner made a numerical error in his decision and order concerning the fine imposed on the housing provider.

Alexandra Corporation, the housing provider, asserts the following error in its notice of appeal, "[i]n his Finding of Fact the Examiner levies a $75.00 fine on the housing provider. The Order, however, imposes a $750.00 fine (10 times as much) without further explanation." (N. at 1) (alteration in original). The housing provider contends that the hearing examiner made a numerical error in rendering the fine against the housing provider, because the hearing examiner originally set a fine of $75.00 in the findings of fact section of the decision and order, but subsequently ordered a $750.00 fine against Alexandra Corporation. As relief from the judgment, the appellant prays that the Commission reverse the decision and order below and dismiss the petition with prejudice, thereby completely vacating the fine. (N. at 2.) In the alternative, the appellant alleges that the fine is on its face erroneous and requests that the Commission reduce the fine to the correct amount, which, in the housing provider's opinion, is $75.00 and not $750.00. Record (tape) of Commission Hearing (July 12, 2000).

Pursuant to 14 DCMR 3807.4, the Commission has the authority to correct "plain error," whether or not a default judgment has been entered in the court below. That rule

states, "[r]eview by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error." 14 DCMR 3807.4. In addition, pursuant to 14 DCMR 3807.1,

> [t]he Commission shall reverse final decisions of the Rent Administrator which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator. (emphasis added).

Notwithstanding the Commission's authority to correct plain error, based on the circumstances of the instant case, the Commission cannot amend the Rent Administrator's order. The substantial evidence in the record does not render the inconsistency between the findings of fact and the order containing the alleged error a "plain error," because the correct fine amount is not obvious to the Commission. Since the Commission cannot make its own findings of fact, it cannot correct the alleged error itself. Therefore, the conflict must be remanded to the OAD for proceedings consistent with this decision in order to resolve the conflict between the finding of fact and the order. The hearing examiner is reversed and this issue is remanded.

B. Whether the hearing examiner improperly applied the law because the issues raised in TP 24,777 were duplicative of the issues raised in a prior suit filed in the District of Columbia Superior Court.

The housing provider argues that the hearing examiner erred in applying the law to the tenant's case, because the issues that the tenant raised in her petition were the same issues that were previously litigated between the parties in D.C. Superior Court. In the Superior Court case, Alexandra Corporation v. Armstead, L/T 18198-99, the housing provider asserts that judgment was found for the housing provider. Therefore, the

housing provider contends that the hearing examiner should have dismissed the tenant petition on the basis of the doctrines of res judicata and collateral estoppel.

The doctrine of res judicata provides, "a final judgment on the merits of a claim bars relitigation [sic] in a subsequent proceeding of the same claim between the same parties or their privies." Patton v. Klein, 746 A.2d 866, 869 (D.C. 1999). In order to apply the doctrine of res judicata, the Commission must determine: (1) whether the claim was adjudicated finally in the first action; (2) whether the present claim is the same as the claim which was raised or which might have been raised in the prior proceeding; and (3) whether the party against whom the plea is asserted was a party or in privity with a party in the prior case. Id. at 870.

> Even where res judicata is inapplicable, collateral estoppel may bar relitigation of the issues determined in a prior action . . . Collateral estoppel or issue preclusion renders conclusive in the same or a subsequent action an issue of fact or law previously 'determined by a court of competent jurisdiction' . . . In order for collateral estoppel to apply '(1) the issue [must be] actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.'

Id. at 871 [citations omitted].

In Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000), the Commission was presented with a similar issue concerning "whether the hearing examiner committed error when he failed to consider the evidence of record regarding the testimony of the parties at the Superior Court trial in Askin v. Pierre-Smith, L&T 048494-97." In Pierre-Smith, the Commission concluded:

> The housing provider did not submit, at the OAD hearing, transcripts of the testimony taken at the Superior Court trial in Askin v. Pierre-Smith, L&T 048494-97. Therefore, the Commission, without evidence in the record, cannot determine the nature of and to what extent the issue of

housing code violations was litigated and adjudicated in Askin v. Pierre-Smith, L&T 048494-97. Accordingly, this appeal issue is dismissed.

Pierre-Smith, TP 24,574 at 25.

Similarly, in the instant case, the housing provider argues that testimony given at the Superior Court trial in Alexandra Corporation v. Armstead, L/T 18198-99, constitutes evidence of duplicative issues raised at the OAD hearing by the tenant. The doctrines of res judicata and collateral estoppel, which were invoked by the housing provider on appeal to the Commission, do not apply to this particular case. In order to apply the doctrine of res judicata, the Rent Administrator had to make findings of fact that satisfied the factors of the doctrines of either res judicata or collateral estoppel stated supra. Because the housing provider defaulted and did not attend the OAD hearing, the housing provider did not provide evidence to the Rent Administrator indicating the context and issues of the Superior Court case. Furthermore, similar to the circumstances in Pierre-Smith v. Askin, supra, the housing provider did not submit transcripts of the testimony taken at the Superior Court trial in Alexandra Corporation v. Armstead, L/T 18198-99 into the OAD record for this case. Therefore, the Commission, without evidence in the record, cannot determine the nature of and to what extent the issues contained in TP 24,777 were litigated and adjudicated in Alexandra Corporation v. Armstead, L/T 18198-99. Accordingly, this appeal issue is denied and the hearing examiner is affirmed.

C. Whether the hearing examiner made an inconsistent ruling because the first tenant petition, TP 24,705, was dismissed by the hearing examiner because the same issues were being litigated in the District of Columbia Superior Court, and the second tenant petition, TP 24,777, involved the same parties, but was not dismissed.

The housing provider contends that TP 24,777 was the second petition filed by the tenant involving the same parties, and that the first petition the tenant filed, TP 24,705,

was dismissed by the hearing examiner because the same issues were being litigated in D.C. Superior Court. Because the prior petition had been dismissed, the housing provider asserts that TP 24,777 should also have been dismissed by the hearing examiner.

Based on the same analysis stated in Issue Two (2), since the housing provider defaulted and did not attend the OAD hearing, the housing provider was unable to present into the record, evidence of TP 24,705, and unable to demonstrate that the same issues were litigated in OAD in TP 24,705. The housing provider invokes the doctrine of res judicata in its defense. Because the housing provider did not attend the OAD hearing, it could not present evidence as to the basic tenet of res judicata, which is "whether a valid, final judgment on the merits was rendered on the first case." Pierre-Smith v. Askin, TP 24,574 supra (citing Newton Towers Ltd. Partnership v. Newton House Tenants Ass'n, TP 20,005 (RHC Feb. 1, 1988). Accordingly, this appeal issue is denied and the hearing examiner is affirmed.

D. Whether the order of the hearing examiner resulted from an ex parte hearing, and whether the same issues had been raised in a prior tenant petition and litigated in Superior Court.

The housing provider asserts that the order of the hearing examiner was the result of an ex parte hearing, which is an application made to the court without notice to the adverse party. The housing provider alleges, "because the same issues had been raised in a prior tenant petition and had been litigated at trial in court with a decision in favor of the housing provider, the housing provider reasonably believed that the instant petition was moot and would be dismissed." (N. at 2.)

In addition, the housing provider contends that the decision and order of the hearing examiner indicated that the hearing was rescheduled, but did not indicate the date

that the hearing was rescheduled. The housing provider further alleges, "[h]ad the Examiner taken notice of his own agencies [sic] records, he would have noted that prior dismissal and litigation in court. Instead the decision was erroneously based on the ex parte [sic] presentation of petitioner." (N. at 2.)

As noted in the procedural history, the hearing for TP 24,777 was originally scheduled for August 18, 1999, but was rescheduled for cause to September 23, 1999. During the Commission hearing, counsel for Alexandra Corporation stated that actual notice of the hearing was received. Record (tape) of Commission Hearing (July 12, 2000). Therefore, despite the fact that the decision and order did not indicate the date of the rescheduled hearing, the housing provider received actual notice of the rescheduled hearing, which stated the date for the rescheduled hearing. (R. 10.)

In addition, as previously stated, the hearing examiner has no obligation to refer to Superior Court cases or previous petitions filed by a party with the RACD where no evidence has been submitted into the record by a party to the suit. The hearing examiner makes findings of fact and conclusions of law based on the record evidence. For instance, in Johnson v. District of Columbia Rental Housing Comm'n, 642 A.2d 135, 136 (D.C. 1994), DCCA reversed the Commission's application of res judicata because "the owners failed as a matter of law to establish their preclusion defense in the proceedings before the hearing examiner."

Accordingly, since the housing provider, in the instant case, did not attend the OAD hearing and submit evidence into the record concerning the prior dismissal of a tenant petition and litigation in court, the hearing examiner did not err in his decision and order. Accordingly, this appeal issue is denied and the hearing examiner is affirmed.

V. CONCLUSION

For the foregoing reasons, the decision of the hearing examiner is affirmed in part, and remanded in part. This case is remanded to OAD for a finding of fact, conclusion of law and an order, on the present record, regarding the amount of the fine levied against the housing provider. No additional hearings are required.

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 24,777 was mailed postage prepaid, by certified mail, this **15th day of August, 2000,** to:

Lorraine E. Armstead
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and

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