

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,896

In re: 3826 Calvert Street, N.W., Basement Area

Ward Four (4)

HOLLY RECKORD
Housing Provider/Appellant

v.

KIMBERLY PEAY
Tenant/Appellee

DECISION AND ORDER

August 9, 2002

PER CURIAM. This case is on appeal to the District of Columbia Rental Housing Commission (Commission) from the District of Columbia Department of Consumer and Regulatory Affairs, Office of Adjudication (OAD). The housing provider filed the appeal pursuant to the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001). The Act, the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-509-510 (2001), and Title 14 of the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991) govern these proceedings.

I. PROCEDURAL HISTORY

Kimberly Peay, the tenant/appellee, filed Tenant Petition (TP) 24,896 with the Rental Accommodations and Conversion Division (RACD) on February 2, 2000.¹

¹ Both parties failed to appear for the originally scheduled hearing on April 13, 2000, because neither received notice. Consequently, the tenant had to submit an amended tenant petition, which she filed with RACD on May 10, 2000.

The housing provider/appellant, Holly Reckord, is the owner of the subject property, a single family home, located at 3826 Calvert Street, N.W. During the summer of 1998, the housing provider and the tenant entered into an oral lease agreement to rent the basement area of the subject housing accommodation. The housing provider lived in the upstairs area of the home with her daughter during the period that the tenant rented the basement area. On February 2, 2000, the tenant filed TP 24,896 with the RACD. In the petition, the tenant alleged that the housing provider: 1) failed to properly register the building in which the tenant's rental unit was located; 2) served the tenant with a Notice to Vacate that failed to comport with the requirements of Section 501 of the Act; and 3) directed retaliatory action against the tenant as a result of exercising her rights under the law.

On November 28, 2000, the Office of Adjudication (OAD) conducted a hearing with Hearing Examiner Gerald J. Roper presiding. The tenant appeared pro se. The housing provider failed to appear at the hearing. Satisfied, however, that service had been effectuated on the housing provider, the hearing examiner proceeded with the hearing in her absence.

On November 27, 2001, the hearing examiner issued the decision and order in TP 24,896 and made the following findings of fact:

1. The subject property is located at 3826 Calvert Street, N.W., Washington, D.C.
2. Kimberly Peay rented the basement area of the subject property at all times relevant to this petition and is the Petitioner in this matter.
3. Holly Reckford [sic] owns the subject property and is the Respondent in this matter

4. No registration documents are on file with RACD for the subject property.
5. Respondent delivered a letter, dated February 7, 2000, to Petitioner requesting Petitioner to terminate her tenancy so that Respondent could regain possession of the subject property for her personal use and occupancy.
6. The letter dated February 7, 2000 to Petitioner did not give Petitioner 90 days to vacate and did not include any information regarding the registration status of the subject property.
7. Respondent orally requested Petitioner to vacate the subject premises by letter dated December 20, 1999.
8. Respondent requested Petitioner to vacate the subject premises on December 14, 1999.
9. Petitioner contacted RACD and the D.C. Law Students in Court program to determine the legality of the December 14, 1999 and December 20, 2000 notices to vacate, respectively.

Peay v. Reckord, TP 24,896 (OAD Nov. 27, 2001) at 4-5.

Based on the evidence submitted and his findings of fact, the hearing examiner made the following conclusions of law:

1. The subject property is not properly registered, pursuant to [D.C. OFFICIAL CODE § 42-3502.05 (f)].
2. Respondent is subject to a \$100.00 civil fine, pursuant to [D.C. OFFICIAL CODE § 42-3502.05(f)].
3. Respondent issued Petitioner an improper notice to vacate, by letter dated February 7, 2000, in violation of [D.C. OFFICIAL CODE § 42-3505.01 (a), (d)].
4. Respondent is subject to a \$100.00 civil fine, pursuant to [D.C. OFFICIAL CODE § 42-3509.1 (b) (3)], for her violation of [D.C. OFFICIAL CODE § 42-3505.01 (a), (d)].
5. Respondent retaliated against petitioner, in violation of [D.C. OFFICIAL CODE § 42-3505.02], when she served Petitioner with an improper notice to vacate, by letter dated February 7, 2000.
6. Respondent is subject to a \$500.00 fine, pursuant to to [D.C. OFFICIAL CODE § 42-3509.1 (b) (3)], for her violation of [D.C. OFFICIAL CODE § 42-3505.02].

Id. at 5-6. In accordance with these conclusions of law, the hearing examiner entered a default judgment, ruling in favor of the tenant.

The housing provider filed a timely notice of appeal on December 14, 2001, and the Commission held a hearing on March 4, 2002.

II. ISSUES ON APPEAL

The housing provider raised the following issues in her notice of appeal and the attached appellate brief:

1. I was not properly notified or present at the hearing.
2. There is a gross typographical error throughout the decision. My name is misspelled as Holly Reckford. My legal name is Holly Reckord.
3. My submissions made in person at the first hearing are not listed among the evidence considered by the hearing examiner.
4. This case should be reconsidered because new evidence is available which proves requesting that [the tenant] vacate the premises was to retake the area for personal use. It is my understanding that the law regarding evictions differ[s] when the area is to be retaken as part of a family residence.

Notice of Appeal at 1; Housing Provider's Brief at 1.

III. DISCUSSION

A. Whether the hearing examiner's decision and order should be reversed because the housing provider did not receive notice of the hearing.

In her notice of appeal, the housing provider challenges the default judgment entered against her as a result of her failure to appear at the OAD hearing because she alleges that she did not receive notice of the OAD hearing.

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 as a result of 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) (citing Dunn v. Proffitt, 408 A.2d 991, 993 (D.C. 1979)).

The District of Columbia Court of Appeals (DCCA) has identified four factors that are considered in determining whether to set aside a default judgment. Those factors are: “(1) whether the movant had actual notice of the proceeding; (2) whether he acted in good faith; (3) whether the moving party acted promptly; and (4) whether a prima facie adequate defense was presented. Against these factors, prejudice to the non-moving party must be considered.” Radwan v. District of Columbia Rental Housing Comm'n, 683 A.2d 478, 481 (1996) (citing Dunn v. Proffitt, 408 A.2d 991, 993 (D.C. 1979)). In addition, the court recognized a motion to vacate a default judgment should be liberally considered, because there is a strong judicial policy favoring a trial on the merits. Dunn, supra, 408 A.2d at 993.

The OAD sent Official Notices of Hearing (Notice) on the instant petition for hearings scheduled for April 13, 2000, and again on September 11, 2000. However, because either one or both parties failed to appear at the first two scheduled hearings, a third hearing date was scheduled for November 28, 2000. Notice of the third hearing was ostensibly sent to each of the parties, however, only the tenant appeared at the final hearing on November 28, 2000. When the housing provider failed to appear at the hearing, Hearing Examiner Roper stated on the record: “We’ll note...that the U.S. Postal

Service has confirmed delivery for Mrs. Holly Reckord at 3826 Calvert Street, N.W., at 0300129000108053590. Having said that, we'll move forward with the hearing on the merits." OAD Hearing Transcript (Tr. at 3-4).

On the issue of notice to the housing provider, the hearing examiner stated in his decision and order: "Respondent failed to appear at the hearing either personally or through a representative. According to the file records notice to the Respondent was sent U.S. Priority Mail. Therefore, valid service was made." Peay v. Reckord, TP 24,896 (OAD Nov. 27, 2001) at 1.

The Commission reviewed the record in order to determine whether the Office of Adjudication properly served the housing provider with notice of the hearing. Upon review of the record, the Commission observed that the record contains two Official Reschedule Notices of Hearing for the hearing on November 28, 2000, one addressed to each of the parties. At the bottom of each Notice is a certificate of service dated November 7, 2000, and signed by Stacey Washington, the official certifying party within OAD. The certificates of service attest that each notice was sent by Priority Mail and by "regular" mail. Record (R.) at 48-49. There is no mention of delivery confirmation service being used. However, affixed to each Notice is a Delivery Confirmation Receipt date stamped November 7, 2000, bearing the United States Postal Service (USPS) tracking numbers 03001290000108053583, and 03001290000108053590 for the tenant's and housing provider's respective mailings. Each Delivery Confirmation Receipt also indicates a telephone number and website of the USPS, which customers can access to confirm delivery of a mailing, using the necessary tracking numbers. There is no documentation in the official record showing that the OAD confirmed delivery of the

Notices to either the tenant or the housing provider by using the Internet tracking service of the USPS to confirm delivery of notice.

The agency, which must strictly adhere to the notice requirements of the Act, as stated in Ungar v. District of Columbia Rental Hous. Comm'n, 535 A.2d 887, 890 (D.C. 1987), failed to properly serve the housing provider with notice of the hearing.

Proper notice of an adjudicatory proceeding is mandated by the Act, case law, and traditional principles of due process of law. In reviewing the issue of notice, the Commission's review is limited to the evidence contained in the record. The Commission must find substantial evidence in the record to support the hearing examiner's finding that the agency sent the notice of the November 28, 2000 hearing to the housing provider. No such evidence was found in the record. Moreover, there is insufficient record proof that the agency sent the hearing notice by certified mail or any other form of service that assures delivery as required by the Act.

D.C. OFFICIAL CODE § 42-3502.16 (c) provides:

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

In Joyce v. District of Columbia Rental Hous. Comm'n, 741 A.2d 24 (D.C. 1999), the DCCA held that the agency failed to provide proper notice of an agency decision, because the agency failed to send the decision by certified mail or other form of service that assures delivery. Citing the Act at D.C. OFFICIAL CODE § 42-3502.16 (j), the court

held that regular first-class mail was not sufficient to assure delivery.² See also Diaz v. Perry, TP 24,379 (RHC Dec. 27, 1999).

Since in the instant case, the OAD elected not to send the Notice by certified mail, the OAD was then obligated to send the Notice by another form of service that "assures delivery." The Commission interprets the holding in Joyce as permitting service via Priority Mail with delivery confirmation, but only when the agency has actually confirmed delivery, documented it, and placed that documentation in the official record. When using Priority Mail with delivery confirmation, it has become standard practice within the agency to evince proper service on a party by obtaining delivery confirmation from the tracking website of the USPS, using the tracking number indicated on the Delivery Confirmation Receipt. That information is then printed from the Internet and placed in the record. Without record proof that the agency has confirmed delivery with the USPS, Priority Mail with delivery confirmation service does not "assure delivery" any more than first-class mail does, and therefore fails to meet the standard enunciated by the DCCA in Joyce and § 42-3502.16 of the Act.

In the instant case, the record is devoid of proof that the OAD confirmed delivery of the Notice to the parties using the Internet tracking service of the USPS. The certificates of service and the Delivery Confirmation Receipts attached to the Notices that appear in the record only demonstrate that notice of the hearing was sent by priority and "regular" mail, not that notice was delivered to the housing provider. Therefore, the

² D.C. OFFICIAL CODE § 42-3502.16 (j) provides:

"A copy of any decision made by the Rent Administrator, or by the Rental Housing Commission under this section shall be mailed by certified mail or other form of service which assures delivery of the decision to the parties."

substantial evidence in the record revealed the agency failed to send notice of the OAD hearing to the housing provider by certified mail or another form of service that “assures delivery.” Consequently, the housing provider was not afforded proper notice as required by the Act and due process of law. See Brown v. Samuels, TP 22,587 (RHC Sept. 17, 1997). Therefore, the hearing examiner erred when he entered a default judgment against the housing provider, who was not afforded proper notice of the hearing.

Since the agency failed to satisfy the “notice” prong of the Radwan test, the remaining three factors are moot. Accordingly, the Commission vacates the hearing examiner’s decision and order and remands the case to OAD for a hearing de novo.

B. Whether the hearing examiner’s typographical errors in misspelling the housing provider’s name constitutes reversible error.

With respect to the second issue listed in her notice of appeal, the housing provider argues that the decision and order is unsound because the hearing examiner misspells her name throughout the decision. In the decision’s caption and throughout the body of the opinion, as well as in other documents in the record, the housing provider is referred to as Holly “Reckford,” instead of Holly “Reckord,” which is the correct spelling of the housing provider’s name.

The regulation, 14 DCMR § 3809.3 (1991), provides:

If it appears to the Commission that the identity of the parties had been incorrectly determined by the Rent Administrator, the Commission may substitute or add the correct parties on its own motion.

Accordingly, the Commission hereby corrects the hearing examiner’s error and holds that Holly Reckord is the correct spelling of the housing provider’s name in the instant case. In addition, the Commission hereby directs the hearing examiner to correct

the spelling error for the benefit of the hearing de novo and in order to cure the agency's records as to the name of the housing provider who owns the subject housing accommodation.

C. Whether the hearing examiner erred by failing to consider evidence that the housing provider submitted when she alone appeared for a hearing that had been rescheduled.

D. Whether the case should be reconsidered in light of newly discovered evidence relating to the retaliation issue raised in the tenant petition.

Because the hearing examiner did not have record proof of service on the housing provider, he erred in conducting the hearing in her absence. As a result of the error, the Commission concludes that the housing provider is entitled to a hearing de novo, during which Ms. Reckord may submit any evidence supportive of her defense, including "old" and "new" evidence. Therefore, it is no longer necessary for the Commission to review the merits of the remaining two issues.

Accordingly, the Commission finds that Issues C and D are moot, and are hereby dismissed.

IV. CONCLUSION

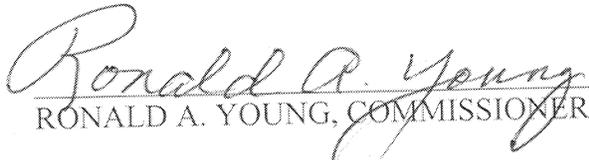
The substantial evidence in the record revealed the OAD failed to effectuate service of notice of the November 28, 2000 hearing to the housing provider as required by § 42-3502.16 of the Act and the DCCA decision in Joyce.

Accordingly, the hearing examiner's decision and order is vacated, and the case is remanded for a hearing de novo.

SO ORDERED.



RUTH R. BANKS, CHAIRPERSON



RONALD A. YOUNG, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DECISION and ORDER** in TP 24,896 was mailed by priority mail with delivery confirmation this **9th day of August 2002** to:

Holly Reckord
3826 Calvert Street, N.W.
Washington, D.C. 20001

Kimberly Peay
3051 Idaho Avenue, N.W.
Apt. 304
Washington, D.C. 20016



LaTonya Miles
Contact Representative