DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,919

In re: 1908 Florida Avenue, N.W., Unit B6

Ward One (1)

RONALD BAKER
Tenant/Appellant

v.

BERNSTEIN MANAGEMENT CORPORATION
Housing Provider/Appellee

DECISION AND ORDER

September 29, 2000

LONG, COMMISSIONER. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), through the 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

On February 28, 2000, Ronald Baker filed Tenant Petition (TP) 24,919 with the RACD challenging the rent charged in connection with his rental unit. Bernstein Management Corporation (Bernstein) operates the housing accommodation located at 1908 Florida Avenue, N.W. The record contains the official notice of hearing for May 1, 2000 and an attendance sheet, which reflects that Ronald Baker and "D. Goldsberry,

landlord," appeared before Hearing Examiner Carl Bradford on May 1, 2000 at 9:00 a.m. However, the case certification from the hearing examiner to the Commission, reflects that there were no hearing tapes at the close of the hearing.

The hearing examiner dismissed TP 24,919, with prejudice, in a decision and order issued on June 20, 2000. On June 23, 2000, the tenant noted an appeal to the Commission. In response, the housing provider moved to dismiss the tenant's appeal arguing the tenant's claims were "barred by the doctrines of res judicata and/or collateral estoppel as a result of the disposition of an earlier Tenant Petition, 24,779." Motion to Dismiss at 1. Attached to the motion was a decision and order purportedly issued in TP 24,779, on May 8, 2000.

In an order issued on August 16, 2000, the Commission denied the housing provider's motion to dismiss and held the hearing on appeal on August 17, 2000. See Baker v. Bernstein Management Corporation, TP 24,919 (RHC Aug. 16, 2000). At the hearing, the housing provider's counsel renewed its motion to dismiss the appeal, notwithstanding the Commission's order. The Commission denied the renewed motion to dismiss and received the parties' arguments on appeal.

II. ISSUES ON APPEAL

In the notice of appeal, the tenant wrote, "Mr. Bradford did not see all of the evidence. Mr. Bradford was combining this case with another case and did not see the evidence. See Exhibits 1-5." Notice of Appeal at 1. Attached to the notice of appeal were five exhibits. Accordingly, the Commission considered the following:

A. Whether the hearing examiner failed to consider the tenant's evidence.

B. Whether the hearing examiner improperly combined TP 24,919 and TP 24,779.

III. DISCUSSION

A. Whether Hearing Examiner Bradford failed to consider the tenant's evidence.

The Act, D.C. CODE § 45-2512, empowers the Commission to decide appeals brought to it from decisions of the Rent Administrator. In order to perform its appellate function, the Commission reviews the testimonial and documentary evidence introduced during the OAD proceedings, and the hearing examiner's decision. The Commission may reverse any decision that is arbitrary, capricious, an abuse of discretion, not in accordance with the Act, or unsupported by the substantial evidence on the record of the proceedings before the Rent Administrator. See D.C. CODE § 45-2526(h). The Commission conducts its review for substantial evidence by listening to the testimonial evidence recorded on the OAD hearing tapes, reviewing the documentary evidence introduced during the hearing, and evaluating the findings of fact and conclusions of law contained in the decision.

In the instant case, the Commission could not conduct its review because there were no tapes of the OAD proceedings, and the decision and order did not contain findings of fact or conclusions of law. Moreover, the hearing examiner impermissibly conducted a "sua sponte" review of the decision and order in TP 24,779. Baker v. Bernstein Management Corporation, TP 24,919 (OAD June 20, 2000) at 1.

The hearing examiner's decision contained two one-paragraph sections entitled Jurisdiction and Procedural History. Both sections were found on page one of the decision. In the section entitled Procedural History, the hearing examiner indicated a

hearing in TP 24,919 was scheduled for May 1, 2000. The hearing examiner stated the housing provider requested a continuance, because it expected a decision in TP 24,779, which dealt with the very same issue raised in TP 24,919. See id.

When the Commission reviewed the record certified by the hearing examiner, the Commission found a request for a continuance from the housing provider to an OAD clerk, dated April 26, 2000. The continuance request did not contain proof of service upon the tenant.[1] According to the OAD attendance sheet, the tenant and the housing provider appeared for the hearing scheduled for May 1, 2000. In the decision, the hearing examiner indicated the housing provider requested a continuance. However, the decision did not include a ruling on the motion for continuance. Since there is no tape of the hearing, there is no record proof that the examiner either held or rescheduled the hearing.

In accordance with the DCAPA, "[e]very party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, and conduct such cross-examination as may be required for a full and true disclosure of the facts." D.C. CODE § 1-1509(b). Moreover, the right to a hearing is guaranteed by 14 DCMR 3903.1, which provides: "[t]he parties to petitions before the Rent Administrator have a right to a hearing in accordance with the provisions of the Act and [C]hapter 40 [14 DCMR 4000]."

---

[1] The record reflects that Donna Goldsberry, Rent Administrator for Bernstein, faxed a memorandum to LaVerne Fletcher, who is the Program Specialist in the Office of Adjudication. In the memorandum, Ms. Goldsberry requested a continuance and enumerated three bases for the request. She indicated the housing provider attended a hearing in TP 24,779, which involved Mr. Baker, the tenant in TP 24,919. The housing provider indicated it was "likely that [TP 24,919] is unwarranted" if the housing provider has a decision in TP 24,779. The memorandum, which did not contain a certificate evidencing service upon Mr. Baker, referenced a previous discussion with Ms. Fletcher. The regulation, 14 DCMR 4002, prohibits ex parte communications. "Oral or written communications regarding a petition ... before the Rent Administrator or staff or RACD, for the benefit of one party only, and without notice to or contestation by the opposing party ... shall be considered ex parte communications." 14 DCMR 4002.1.

Since there are no tapes from the OAD hearing, the record is devoid of proof that the hearing examiner held a hearing and afforded Mr. Baker the right to present testimony and exhibits as mandated by D.C. CODE § 1-1509(b) and 14 DCMR 3903.1. In the tenant's appeal, he indicated the examiner did not see all of the evidence, which suggests the hearing examiner did not permit the tenant to introduce documentary evidence. The hearing examiner's failure to hold a hearing, afford the parties an opportunity to present oral and documentary evidence, and record the proceedings, left the record devoid of the requisite evidence for review.

In accordance with D.C. CODE § 45-2512, the Commission decides appeals brought to it from decisions issued by the hearing examiners. In order to decide the appeal, the Commission reviews the hearing examiner's decision and order and the testimony and exhibits introduced during the OAD proceedings. Since the hearing examiner did not certify a tape recording of the OAD proceedings, the record is incomplete. See 14 DCMR §§ 3804.3(b) and 4007.1(b). In Joyce v. Webb, TPs 20,720 & TP 20,739 (RHC July 30, 2000) at 9-10, the Commission stated:

> Inherent in the DCAPA requirement that "testimony" be preserved is that all of the testimony be preserved, unless the parties agree to a lesser portion. In this case, the parties have not agreed to a lesser portion of the testimony. The Commission, sua sponte, has held in many cases that it cannot review the record without hearing tapes. Mellon Property Management v. Tenants of 1111 Columbia Road, N.W., HP 20,745 (RHC May 19, 1997)(citations omitted), Dorchester House Assoc. v. Tenants of Dorchester House, CI 20,672, TP 22,558, TP 23,520, TP 23,909, TP 23,973 (RHC June 3, 1997) (five consolidated cases remanded for lack of hearing tapes and other missing evidence); Holberg v. Davis, TP 23,529 (RHC Apr. 11, 1996); Cannon v. Stevens, TP 23,523 (RHC Apr. 11, 1996).

Accordingly, the Commission could not review the record in the instant case, because there were no OAD hearing tapes. Moreover, the Commission's ability to decide the

appeal was frustrated by the absence of findings of fact and conclusions of law in the OAD decision and order.

The decision in TP 24,919 contained two sections, followed by Hearing Examiner Bradford's order. In the section entitled Jurisdiction, the hearing examiner indicated the agency's authority to adjudicate TP 24,919 was derived from the Act, the DCAPA, and 14 DCMR 3800 et seq. The remainder of the decision consisted of the following:

> Procedural History
>
> Tenant Petitions [sic] T/P #24,919 [sic] was filed with RACD on February 28, 2000. The matter was originally scheduled to be heard on May 1, 2000. The Respondent requested that the matter be continued because he expected a decision to come out soon regarding T/P 24,779 filed August 4, 1999 and heard October 4, 1999, dealing with the very same issue raised in this petition. The Examiner sua sponte, reviewed the decision issued [sic] May 8, 2000 and found that the case had been dismissed by Examiner Word after determining that no illegal rent increase had been taken. Accordingly, the Examiner dismisses this petition.
>
> Order
>
> Therefore, it is hereby ORDERED this ___ [sic] day of Jun [sic] 20, 2000 _____, 2000, [sic] that Tenant Petition #24,919 is hereby denied and dismissed, with prejudice.
>
> It is FURTHER ORDERED that,
>
> This decision is effective immediately.

Baker, TP 24,919 at 1-2.

Remarkably absent from the decision were findings of fact and conclusions of law. The examiner's responsibility to issue findings of fact and conclusions of law is prescribed by the DCAPA, D.C. CODE § 1-1509(e), which provides:

> Every decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact shall be supported by and in accordance with the reliable, probative, and

> substantial evidence. A copy of the decision and order and accompanying findings and conclusions shall be given ... to each party or to his attorney of record. (emphasis added).

In order to satisfy the requirements of D.C. CODE § 1-1509(e), "(1) the decision must state findings of fact on each material, contested, factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." Perkins v. District of Columbia Dep't of Employment Services, 482 A.2d 401, 402 (D.C. 1984) quoted in Nursing Services v. District of Columbia Dep't of Employment Services, 512 A.2d 301, 302-303 (D.C. 1986); Thorpe v. Independence Federal Savings Bank, TP 24,271 (Aug. 19, 1999) at 9. See also Spevak v. District of Columbia Alcoholic Beverage and Control Bd., 407 A.2d 549, 553 (D.C. 1979).

The hearing examiner failed to meet the requirements of the DCAPA, because the decision and order did not contain findings of fact or conclusions of law. During oral argument before the Commission, the housing provider maintained that findings of fact and conclusions of law were not required in TP 24,919, because the hearing examiner "incorporated by reference" the findings of fact and conclusions of law in TP 24,779. The housing provider's position is fraught with both factual and legal error.

The hearing examiner did not annex the decision and order in TP 24,779 to the decision and order in TP 24,919, and a copy of the decision was not found in the certified record. The examiner did not indicate the decision and order in TP 24,779 contained findings of fact and conclusions of law, and he did not state that he incorporated the findings of fact and conclusions of law into the decision and order in TP 24,919. Moreover, the DCAPA at D.C. CODE § 1-1509(e) requires "every decision and order to

contain findings of fact and conclusions of law." The DCAPA does not permit the examiner or the Commission to rely upon findings of fact and conclusions of law in one case, when the findings are absent from the decision that is subject to review.

> [The Court] responded to this fact-finding gap by underscoring the first requirement of § 1-1509(e) [which provides] there must be one or more affirmative, written findings on "each [material] contested issue of fact." The court cannot properly fill the gap itself by ... the agency's other findings, and the ultimate decision. (citation omitted). We concluded, rather, that the agency's own findings must support the end result in a discernible manner, and the result reached must be supported by subsidiary findings of basic facts on all material issues.

Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Comm'n, 402 A.2d 36, 42 (D.C. 1979); Dietrich v. Board of Zoning Adjustment, 293 A.2d 470, 472-473 (D.C. 1972). The hearing examiner dismissed TP 24,919 with prejudice. This "end result" was not supported by the hearing examiner's "own findings" in TP 24,919, because there were no findings of fact in the decision. Id.

Accordingly, the housing provider's argument, that the examiner's failure to include findings of fact and conclusions of law in TP 24,919 was overcome because he incorporated the findings and conclusions in TP 24,779, fails. There was no record proof that incorporation occurred, and the DCAPA and case precedent prohibit the examiner from filling the "fact-finding gap ... [with] the agency's other findings." Id.

For the foregoing reasons, the hearing examiner erred when he failed to record the OAD proceedings, to hold a hearing or permit the tenant to introduce exhibits, and when he failed to issue a decision and order that contained findings of fact and conclusions of law. Accordingly, the tenant's appeal issue is granted, and the hearing examiner's decision is reversed.

B. Whether Hearing Examiner Bradford improperly combined TP 24,919 and TP 24,779 without seeing the evidence.

The hearing examiner "sua sponte, reviewed the decision issued on May 8, 2000 and found that the case had been dismissed by Examiner Word after determining that no illegal rent increase had been taken." Baker, TP 24,919 at 1. The hearing examiner did not indicate the legal predicate for the dismissal. However, he indicated the housing provider requested a continuance of the hearing in TP 24,919 because the housing provider expected a decision in TP 24,779, which involved the very same issue in TP 24,919. This appears to be a vague reference to claim preclusion or res judicata. When the housing provider submitted its Motion to Dismiss to the Commission, it attached a copy of the decision and order in TP 24,779 and urged the Commission to dismiss TP 24,919 pursuant to the doctrine of res judicata or collateral estoppel.

The doctrine of res judicata is an affirmative defense that the housing provider had to plead and establish before the hearing examiner. "Under the doctrine of res judicata (claim preclusion), a final judgment on the merits of a claim bars relitigation 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). "To evaluate a claim of preclusion, the trier of fact must 'have before it the exhibits and records involved in the prior case.'" Johnson v. District of Columbia Rental Hous. Comm'n, 642 A.2d 135, 139 (D.C. 1994) quoting Block v. Wilson, 54 A.2d 646, 648 (D.C. 1947). The hearing examiner must have the requisite quantum of evidence to 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 privy with a party in

the prior case." Patton, 746 A.2d at 870. The hearing examiner's determinations must be memorialized in a written decision that contains findings of fact and conclusions of law on the applicability of the doctrine of res judicata.

> Even where res judicata is inapplicable, collateral estoppel may bar relitigation of the issues determined in a prior action. ... 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. (quoting Washington Med. Ctr., Inc. v. Holle, 573 A.2d 1269, 1283 (D.C. 1990)). See also Alexandra Corp. v. Armstead, TP 24,777 (RHC Aug. 15, 2000).

In the instant case, the housing provider did not take affirmative steps to establish the defense of res judicata or collateral estoppel in a hearing before the examiner, who is the agency's trier of fact. The OAD record is devoid of any oral or documentary evidence to support issue or claim preclusion, because the housing provider did not place any exhibits or records in TP 24,779 into evidence during a hearing in TP 24,919. See Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000) (where the Commission held it could not determine the nature and extent to which an issue was previously litigated, because the housing provider did not introduce transcripts of the prior proceeding into evidence during the adjudicatory hearing).

Moreover, the hearing examiner erred when he conducted a sua sponte review of the decision in TP 24,779, because he could not notice the decision in TP 24,779 "to overcome the patent insufficiency of the [housing provider's] proof...." Johnson, 642 A.2d at 138. The hearing examiner also erred when he failed to give the tenant an opportunity to present evidence to show the contrary of the facts officially noticed. The DCAPA, D.C. CODE § 1-1509(b), provides in relevant part:

> Where any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in evidence in the record, any party to such a case shall on timely request be afforded an opportunity to show the contrary.

In order to satisfy the requirements of § 1-1509(b), the "agency must notify the parties that a material fact is being officially noticed so that the parties have an opportunity to rebut the fact." Carey v. District of Columbia Unemployment Compensation Bd., 304 A.2d 18, 20 (D.C. 1973) quoted in Renard v. District of Columbia Dep't of Employment Services, 673 A.2d 1274, 1277 (D.C. 1995). See also Baker v. Bernstein Management Corporation, TP 24,919 (RHC Aug. 16, 2000) at 3-4.

In Johnson, the housing provider asked the hearing examiner to take official notice of the decision and order that supported its res judicata claim. The Court indicated an examiner's prior written decision was the only proof the housing provider offered in support of its preclusion claim. The Court noted that the housing provider first introduced the actual tenant petitions at oral argument before the Commission and asked the Commission to take official notice of them. The Commission took official notice of the entire RACD file, which included the tenant petitions introduced by the housing provider during the Commission hearing. After reviewing the RACD file, the Commission applied the doctrine of res judicata to reverse the hearing examiner's decision and order.

In the District of Columbia Court of Appeals, the tenant challenged the Commission's taking of official notice on the grounds that res judicata is an affirmative defense that the housing provider was required to prove before the trier of fact. The tenant argued the Commission, an appellate body, was not empowered to make findings of fact, and it could not receive new evidence on appeal.

The Court held that the Commission erred when it took official notice of the RACD file, because the Commission failed to give the opposing party an opportunity to show the contrary. In addition, the Court noted the Commission was an appellate body and its function did not extend to making findings as it did when it took official notice of the RACD record and drew factual conclusions from the documents noticed. The Court 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." Johnson, 642 A.2d at 135.

The Court elaborated on its holding by stating, "the owners failed to establish the defense of res judicata before the examiner, because the sole evidence they offered on the point was the prior RACD decision, which did not prove [res judicata] by the necessary quantum of evidence. ... Counsel for the owners failed to offer even the original tenant petitions, which he later found in his files. The examiner therefore had sound reason to reject the claim of res judicata." Johnson, 642 at 139.

In the instant case, there is no evidence that the housing provider moved a copy of the decision in TP 24,779 into evidence before the hearing examiner. In contrast, the housing provider in Johnson introduced a copy of a decision to the hearing examiner. However, the Court ruled the decision did not constitute sufficient evidence to support the housing provider's preclusion claim. In the instant case, the record is devoid of any quantum of evidence, because the housing provider did not establish its defense in the proper forum.

Instead of proving its defense before the agency's fact finder, the housing provider attached a copy of the decision and order in TP 24,779 to the Motion to Dismiss that it

filed in the Commission. Since the housing provider did not introduce TP 24,779 into evidence before the hearing examiner, the Commission could not consider it because 14 DCMR 3807.5 precludes the Commission from receiving new evidence on appeal.

The housing provider's failure to establish its defense before the hearing examiner cannot be cured by filing a copy of the decision in TP 24,779 with the Commission. In Johnson, the Court reversed the Commission when it took official notice of documents that the housing provider did not offer to the hearing examiner in support of its preclusion claim. In direct contravention of Johnson, the housing provider submitted a decision to the Commission that it did not submit to the hearing examiner. In accordance with Johnson, the Commission could not review the decision in TP 24,779, which was first filed on appeal.

When the hearing examiner dismissed TP 24,919 based upon his sua sponte review of TP 24,779, he did not have before him the exhibits and records in the prior case. See Johnson, 624 A.2d at 139. Tenant Petition 24,779 was not properly before the hearing examiner, because it was not introduced into evidence by a party, and the examiner noticed the decision without giving the tenant an opportunity to present evidence to the contrary. In addition, a copy of a decision, without more, is insufficient to prove res judicata or collateral estoppel.

Res judicata and collateral estoppel, when proven, prohibit the moving party from maintaining its claim. The denial of the right to present a claim cannot be decided without competent evidence, which was introduced during a hearing and subject to cross-examination. The examiner must weigh the evidence presented, summarize the salient portions of the evidence in a written decision, issue findings of fact on each material

contested factual issue, based upon the substantial record evidence, and the hearing examiner must issue conclusions of law that flow rationally from the findings. See Perkins, 482 A.2d at 402.

The hearing examiner's dismissal of TP 24,919 based upon his sua sponte review of TP 24,779 is reversed. Hearing Examiner Bradford impermissibly noticed a decision, which was not in the record of the proceedings, and failed to give the tenant an opportunity to show the contrary. The hearing examiner's dismissal of TP 24,919, based upon Hearing Examiner Word's determination that no illegal rent increase had been taken in TP 24,779, was not a proper legal basis for dismissing TP 24,919. Moreover, there was no substantial record evidence to support a dismissal pursuant to the doctrine of res judicata or collateral estoppel, and the decision in TP 24,919 did not contain findings of fact or conclusions of law on any of the contested issues.

Accordingly, the tenant's request for reversal, because the hearing examiner improperly combined TP 24,919 and TP 24,779 without considering the tenant's evidence, is granted.

IV. CONCLUSION

The Commission could not conduct its review of TP 24,919 because there were no tapes of the OAD proceedings; the hearing examiner failed to hold a hearing in accordance with the DCAPA; and the decision and order did not contain findings of fact or conclusions of law. Moreover, the hearing examiner impermissibly conducted a sua sponte review of the decision and order in TP 24,779, and failed to afford the tenant an opportunity to present evidence to the contrary. There was no record evidence to support the dismissal of TP 24,919 based upon TP 24,779, because there was no competent

evidence to support a dismissal pursuant to the doctrine of res judicata or collateral estoppel.

The tenant's request for a reversal, because the hearing examiner failed to consider the tenant's evidence and improperly combined TP 24,919 and TP 24,779, is granted. Accordingly, the Commission reverses and remands TP 24,919 for a de novo hearing. The Commission directs the hearing examiner to conduct a hearing in accordance with the Act, DCAPA, and 14 DCMR 3800 et seq.; record all of the proceedings; and issue a decision and order that contains findings of fact and conclusions of law on each contested issue of fact.

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 24,919 was sent certified mail, postage prepaid, this 29th day of September 2000 to:

Ronald Baker
1908 Florida Avenue, N.W.
Unit B6
Washington, D.C. 20009

Deckelbaum Ogens Reiser
Shedlock & Raftery, Chtd.
Bryn H. Sherman, Esquire
Stephen Nichols, Esquire
3 Bethesda Metro Center
Suite 200
Bethesda, MD 20814

LaTonya Miles
Contact Representative