DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,972

In re: 4327 Third Street, S.E., Unit 204

Ward Eight

DARNETTIA BLAKNEY
Tenant/Appellant

v.

ATLANTIC TERRACE/WINN MGT
Housing Provider/Appellee

DECISION AND ORDER

March 28, 2002

PER CURIUM. This case is on appeal to the District of Columbia Rental Housing Commission from the Rent Administrator's decision in TP 24,972. The tenant 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), et seq., and Title 14 of the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991) govern these proceedings.

I. PROCEDURAL HISTORY

Tenant-appellant filed Tenant Petition (TP) 24,972 with the Rental Accommodations and Conversion Division (RACD) on May 16, 2000. In the petition, the tenant made two claims against the housing provider, Atlantic Terrace/Winn Management: 1) that management had substantially reduced services in her rental unit in violation of D.C. OFFICIAL CODE § 42-3502.11 and 14 DCMR § 4211; and 2) the housing

provider had retaliated against her for exercising her right to report suspected housing violations in her unit to the housing inspector.

On September 7, 2000, an Office of Adjudication (OAD) hearing was conducted with Hearing Examiner Carl Bradford presiding. On November 14, 2001, the hearing examiner issued the decision and order in TP 24,972 and made the following pertinent findings of fact:

1. Petitioner on February 20, 2000 contacted the Department of Housing [District of Columbia Housing Authority] and made a request for emergency assistance [sic] because of much needed repairs in her unit.

2. Respondent was cited by the DCHA for housing code violations in Petitioner's rental unit [on] February 22, 2000.

3. Respondent has not substantially reduced the service[s] and facilities to Petitioner.

4. Respondent has not retaliated against Petitioner.

Blakney v. Atlantic Terrace/Winn Mgt., TP 24,972 (OAD Nov. 14, 2001) at 6-7.

The hearing examiner concluded as a matter of law:

1. Respondent did not substantially reduce the services and facilities of Petitioner's rental unit by failing to provide maintenance and repair services as needed in violation of D.C. [OFFICIAL CODE § 42-3502.11], and 14 DCMR 4211.

2. Respondent has not retaliated against Petitioner in violation of D.C. [OFFICIAL CODE § 42-3505.02].

As a result, the hearing examiner dismissed with prejudice all issues raised by the tenant. Id. at 7.

The tenant filed an appeal on November 30, 2001, and the Commission held the hearing on the appeal on January 15, 2002.

II. FACTUAL BACKGROUND

Ms. Blakney began her tenancy at 4327 Third Street, Unit 204, S E., on September 1, 1996. The rental unit is located at the Atlantic Terrace multi-housing complex, and is subsidized by the U.S. Department of Housing and Urban Development (HUD). The tenant made repeated attempts to have the housing provider repair several problems in her rental unit. Unsatisfied with management's response, on February 20, 2000, Ms. Blakney contacted the District of Columbia Housing Authority (DCHA) to request an inspection. The record indicates that the DCHA performed inspections on February 22, 2000 and again on March 22, 2000. The record further shows that as a result of each inspection, the DCHA cited the housing provider for several housing code violations within the tenant's unit and gave management one month to bring the unit into compliance. The record further shows that on February 28, 2000, and again on March 30, 2000, the housing provider sent to the tenant a letter itemizing various repairs it completed and demanding payment of $295.00, the total cost for some of the completed repairs.[1] Finally, on May 1, 2000, the housing provider sent to the tenant a notice to cure violations of her tenancy or to vacate the premises within 30 days if payment was not received for the repairs within that time period. In the letter, management claimed that the damages in the rental unit were caused not by ordinary wear-and-tear, but by the tenant's own negligence or that of her family or guests The letter further stated that by failing to pay for the repairs for which she was allegedly responsible, Ms. Blakney was

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[1] Winn Management sent letters dated February 28, 2000 and March 30, 2000 to tenant-appellant itemizing completed repairs, totaling $295 00 They were listed with costs as follows

Replaced closet door -- $85 00
Replaced bedroom door -- $125 00
Replaced tooth brush -- $50 00
holder/paper holder
Replaced towel rack and soap dish -- $35 00

"violating the obligations of her tenancy" under her lease agreement and that by virtue of D.C. OFFICIAL CODE §42-3505.01, the landlord was entitled to recover possession of the unit.

III. ISSUES ON APPEAL

The tenant, alleging that the hearing examiner misapplied the law and issued a decision not supported by the evidence in the record, raised the following issue in her notice of appeal:

> Whether the hearing examiner committed reversible error by placing on the tenant the burden of proving that the housing provider intended to retaliate in direct contravention of D.C. OFFICIAL CODE § 42-3505.02.

IV. DISCUSSION

A. Preliminary Issue: Whether the hearing examiner and the Commission have jurisdiction over claims of retaliation involving federally subsidized rental units.

This case involves the interpretation and enforcement of § 42-3505.02 of the Rental Housing Act of 1985, which makes it unlawful for a housing provider to retaliate against tenants who have performed certain protected actions. This case specifically concerns whether the retaliation provisions of the Act are applicable to federally subsidized rental units. It is well-settled that courts may, sua sponte, without request by the parties, consider whether there is proper jurisdiction over the subject of an appeal. Brandywine Limited Partnership v. Rental Hous. Comm'n, 631 A.2d 415, 416 (D C. 1993). Therefore, although neither party has raised the issue on appeal, we consider as a preliminary matter, whether the Rent Administrator and the Commission have jurisdiction to decide cases of retaliation involving a federally subsidized rental unit

Tenant-appellant's petition originally contained two claims: the retaliation charge and a second claim of reduction of services. The hearing examiner, however, ultimately

found that because the unit in question was federally subsidized, he did not have the authority to render a decision on the reduction in services issue. Consequently, the hearing examiner dismissed the tenant's reduction of services claim based on a lack of jurisdiction pursuant to D C. OFFICIAL CODE § 42-3502.05(1)(A).[2] The hearing examiner, nevertheless, assumed jurisdiction over the retaliation issue and continued to hear testimony thereon, but failed to explain why he made the distinction between the two issues in his final decision and order.

Relying on prior Commission decisions, we conclude the Rent Administrator and the Commission have limited jurisdiction over District properties that are expressly excluded from the Rental Housing Act's rent control provisions.

In FLC Design Build, LTD v. Proctor, TP 24,593 (OAD May 26, 1999), the Commission reversed the hearing examiner's award of relocation assistance to the tenant petitioner for lack of authority under D.C. OFFICIAL CODE § 42-3502.04(c), which provides the scope of jurisdiction of the Rent Administrator and the hearing examiner acting on delegated authority:

> The Rent Administrator shall have jurisdiction over those complaints and petitions arising under subchapter II, IV, V, VI and IX of this chapter and Title V of the Rental Housing Act of 1980 which may be disposed of through administrative proceedings.

FLC Design Build, LTD v. Proctor, TP 24,593 (May 26, 1999) at 4.

Since the prohibition on retaliatory action at § 42-3505.02 lies within Title V of the Act, the hearing examiner, and by extension, the Commission, have jurisdiction to

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[2] Furthermore, at this point in the hearing, the tenant indicated that she only wished to pursue the single claim of retaliation, thereby waiving the reduction in services claim

decide the retaliation issue. Furthermore, this authority also extends to cases involving rental units otherwise excluded from the Act.

In Sendar v. Burke, HP 20,213 and TP 20,772 (Apr. 6, 1988), the Commission stated, "the universe of rental units in the District is divided into two groups: those that are excluded altogether from Rental Housing Act coverage and those that are not." Id. at 7. Accordingly, the Commission recognized that the Act applies to *all* rental units within the District except those units for which the Act creates special exemptions. The decision further states: "Exclusion from the Act's basic coverage is not to be confused with exemption from its rent control provisions." Id. at 6. The Commission held that only those properties specifically enumerated in § 42-3505.02(e) are excluded from all Chapters and provisions in the Act.[3]

We further stated: "By contrast, exemption from rent control is found within [§ 42-3502.05] of the Act and must be claimed according to the Act's provisions. An

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[3] D.C. Official Code § 42-3502.05(e).

> (e) This chapter shall not apply to the following units
> (1) Any rental unit operated by a foreign government as a residence for diplomatic personnel,
> (2) Any rental unit in an establishment which has as its primary purpose providing diagnostic care and treatment of disease, including, but not limited to, hospitals, convalescent homes, nursing homes, and personal care homes,
> (3) Any dormitory; and
> (4) Following a determination by the Rent Administrator, any rental unit or housing accommodation intended for use as long-term temporary housing by families with 1 or more members that satisfies each of the following requirements.
> (A) The Rental unit or housing accommodation is occupied by families that, at the time of their initial occupancy, have had incomes at or below 50% of the District median income for families of the size in question for the immediately preceding 12 months,
> (B) The housing provider of the rental unit or housing accommodation is a nonprofit charitable organization that operates the unit or housing accommodation on a strictly not-for-profit basis under which no part of the net earnings of the housing provider inure to the benefit of or are distributable to its directors, officers, or any private individual other than as reasonable compensation for services rendered, and
> (C) The housing provider offers a comprehensive social services program to resident families

exempt unit is free only from limited, specific sections in Chapter 2, but is subject to all other provisions of the Act." Id. at 7.

Because it is HUD-subsidized, the rental unit at issue fits within one of the categories excluded from the Act's rent control provisions pursuant to § 42-3502.05(a). This section provides in pertinent part:

> § 42-3502.05 Registration and Coverage
>
> (a) Sections 42-3502.05(f) through §42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District of Columbia except.
>
> (1) Any rental unit in any federally or District-owned housing accommodation or in any housing accommodation with respect to which the mortgage or rent is federally or District-subsidized except units subsidized under subchapter III.

See also Turner v. Jackson, TP 11, 977 (Feb. 18, 1987) (affirming the hearing examiner's application of § 42-3505.02 to a rental unit that was exempt from the Act's Title II rent ceiling provisions).

For the reasons stated above, the tenant's rental unit is not excluded from all the provisions of the Rental Housing Act. Only the Act's rent control provisions (found at §§ 42-3502.05(f) through 42-3502.19 of the Act) do not apply to the tenant's rental unit. Accordingly, we hold that the Rent Administrator and the Commission have jurisdiction to decide retaliation claims involving federally subsidized rental units.

B. Whether the housing provider retaliated against the tenant.

The sole issue raised in the tenant's notice of appeal is whether the housing provider unlawfully retaliated against her in violation of D.C. OFFICIAL CODE § 42-3505.02 by sending a notice to cure after the tenant filed a complaint with the housing inspector.

The Act prohibits a housing provider from retaliating against a tenant who exercises his or her statutory rights by committing any one of an enumerated list of protected actions. D.C. OFFICIAL CODE § 42-3505.02 provides in pertinent part:

> (a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination a tenancy without cause, or any other form of threat or coercion.

D.C. OFFICIAL CODE § 42-3505.02(b) then defines six different categories of actions by a tenant whose eviction within six months of the protected activity will be *presumed* to have been retaliatory. Among those protected tenants are persons who have:

> (1) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations.

The tenant contacted the housing inspector on February 20, 2000, and had inspections performed on the unit on February 22, 2000 and again on March 22, 2000, less than six months prior to receiving the notice to cure on May 1, 2000. Accordingly, the tenant clearly falls within the Act's protected actors. Therefore, in accordance with the statute, after Ms. Blakney made a report to the housing inspector within the statutory time frame, the presumption automatically arose in her favor.

D.C. OFFICIAL CODE § 42-3505.02(b) further provides:

> (b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall *presume* retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption... (emphasis added).

To the contrary, however, counsel for the housing provider argues that in order for the tenant to get the benefit of the presumption, she must offer affirmative proof not only that the tenant called the housing inspector, but also that the housing provider had actual notice that the inspection was tenant-initiated as opposed to being an ordinary HUD-mandated annual inspection.

Both the tenant and housing provider testified at the hearing below that Ms. Blakney's rental unit received annual HUD-mandated inspections. Respondent argues that because annual inspections are a routine and normal part of its business throughout the property, it could be reasonably assumed that the housing provider did not know that tenant initiated the inspection, and therefore could not have formed any retaliatory intent. He further asserted that because Ms. Blakney failed to offer proof of actual notice, "the tenant did not carry the burden that the landlord acted improperly when there is always an inspection." OAD Hearing Tape (Sept. 7, 2000).

Although the decision and order was not entirely clear on this point, the hearing examiner agreed that the statute required greater proof than the tenant provided in order to give rise to the presumption in her favor. The decision states:

> The Examiner is not persuaded by the evidence that the Respondent harassed Petitioner for calling the Housing Inspection Division by attempting to charge Petitioner for some of the repairs made in her unit. Even though there is a presumption that Respondent retaliated against the Petitioner the evidence does not support the presumption. Accordingly, the Examiner dismisses the issue.

Blakney v. Atlantic Terrace/Winn Mgt., TP 24,972 (OAD Nov. 14, 2001) at 6.

The hearing examiner and the housing provider are mistaken in the law. On its face, the statute only requires a showing that the tenant exercised a right provided by the Act within the preceding six months of the alleged retaliatory action. It does not require that the tenant must also show that the housing provider was aware that the protected action occurred. D.C. OFFICIAL CODE § 42-3505.02(b) plainly states: "In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken..." if the tenant has performed the protected action "...within six months preceding the housing provider's action."

Among the stated findings of fact in the decision and order, the examiner clearly found that the tenant "contacted the Department of Housing [DCHA] and made a request for emergency assistance [sic]." Id. at 6-7. Thus, in accordance with D.C. OFFICIAL CODE § 42-3505.02(b), once the examiner found as a matter of fact that Ms. Blakney called the housing inspector and within six months the housing provider sent a notice to cure, the law required the examiner to "*presume* retaliatory action has been taken" and to "enter judgment in the tenant's favor." The presumption of retaliation prevails unless the housing provider comes forward with clear and convincing evidence to rebut the presumption.

In lay terms, the word "presumption" connotes a belief of some fact without certain proof of its actual existence. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 932 (9th ed. 1985), defines "presume" as "to suppose to be true without proof" (*presumed* innocent until proved guilty)." In legal terms, the meaning is substantially the same. BLACK'S LAW DICTIONARY 1067 (5th ed. 1979), defines presumption as: "a rule of law,

statutory or judicial, by which finding of a basic fact gives rise to the existence of presumed fact, until presumption is rebutted."

Construed either strictly or liberally, the statute simply does not require the housing provider's actual knowledge to raise the presumption of retaliation. Furthermore, nothing in the subsequent case law interpreting § 42-3505.02 suggests that the statute has a requirement of actual knowledge on the part of the housing provider. In contrast, the case law interpreting § 42-3505.02 is abundantly clear with respect to the presumption in favor of the tenant.

The District of Columbia Court of Appeals (DCCA) settled the issue in Cowan v. Yousseff, 687 A. 2d 594 (D.C. 1996). The housing provider in Cowan sent a notice to cure and subsequently initiated eviction proceedings after he discovered that the tenants did not have electricity in their unit and were powering their refrigerator and other appliances by running an extension cord from a neighbor's apartment on the ninth floor down to their fourth-floor apartment. Consequently, the housing provider argued that he sought to recover possession, not in retaliation for the tenant association's lawsuit, but because the tenants had violated the building code and created an extra-hazardous condition in violation of their tenancy. The Court reversed the District of Columbia Superior Court's decision allowing the landlord to take possession of the apartment, holding that under § 42-3505.02 the tenants were qualified for special statutory protection from retaliatory eviction as a result of their participation in a separate suit against the owner brought by the building's tenant association.

There, not unlike the hearing examiner's comments in this case, the trial judge stated after closing arguments in the hearing, "You've [the tenants] made reference to the

fact that all of this is a product of harassment and retaliation, and let me say that none of that has been substantiated." Cowan, 684 A.2d at 155.

Without addressing whether the housing provider had met his burden to rebut the presumption, the DCCA reversed the court below, stating: "the court never recognized that once the tenant is eligible for the benefit of the statutory presumption, the landlord bears the burden of proving a non-retaliatory purpose behind the eviction." Cowan, 684 A.2d at 155.

Likewise, here we need not reach the question of whether the housing provider met its burden to rebut the presumption by clear and convincing evidence, because the hearing examiner failed to apply the statutory presumption in favor of the tenant; therefore, the burden was never shifted to the housing provider.

Earlier decisions of the Commission further support the Court's interpretation of § 42-3505.02 in Cowan. In Chaney v. H.S. Turner Real Estate Co., TP 20,347 (Mar. 24, 1989), the Commission held that the housing provider did retaliate when he attempted to raise the rent from $325 00 to $650.00 within three months after the tenant brought legal action against the housing provider on a separate matter. The Commission held that the successful prosecution of the tenant's earlier petition raised the statutory presumption and that the housing provider offered no clear and convincing evidence to rebut the presumption. Id. at 5.

The housing provider complains that § 42-3505.02 of the Act makes it unduly difficult for housing providers to recover repair costs for damages to the unit where the housing provider has a good faith belief that the damage was caused by tenant negligence. The housing provider stated at the hearing below, "it's almost as if to say

well, the landlord can't proceed – even pursuant to law – to make those judgment calls [that damages to the unit are a result of tenant negligence and not by ordinary use]." OAD Hearing Tape, (Sept. 7, 2000).

By alleging that the statute requires actual notice of the protected action, the housing provider asks us to read into the statute that which is plainly not there. This, the Commission cannot do. The legislature in its own wisdom, decided that it was in the public's best interest to place the onus of disproving retaliation with the housing provider when a tenant has exercised a right provided by the Act within the preceding six months of the alleged retaliatory action. While it may be the case that as the law currently exists, some housing providers might have to pay for damage to a rental unit that is in fact beyond normal wear-and-tear, it is not the prerogative of this Commission to second-guess the policy-making decisions of the legislature.

V. CONCLUSION

Once the tenant offered evidence that she reported suspected housing violations to the housing inspector, she satisfied her burden of proof and the presumption arose in her favor. The housing provider was then obligated under the statute to rebut that presumption by clear and convincing evidence. The hearing examiner committed error by failing to shift the burden of proof to the housing provider once he found that the protected action had in fact occurred. We, therefore, reverse the judgment of the hearing examiner as contrary to law and the case is remanded so that the hearing examiner can apply the correct legal standard. The evidence in the existing record is a sufficient basis on which the examiner shall issue a new decision. In accordance with Wire Properties v.

District of Columbia Rental Hous. Comm'n, 476 A 2d 679 (D.C. 1984), the examiner shall not conduct a hearing de novo.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DECISION and ORDER** in TP 24,972 was mailed by priority mail with delivery confirmation this **28th day of March, 2002** to.

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