DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,979

In re: 6980 Maple Street, N.W.

Ward Four (4)

GBUTA-KLA BEDELL
Tenant/Appellant

v.

JOHN CLARKE
Housing Provider/Appellee

DECISION AND ORDER

April 19, 2006

BANKS, CHAIRPERSON. This case is on appeal to the Rental Housing Commission (Commission) from a decision and order issued by the Rent Administrator, based on a petition filed in the Rental Accommodations and Conversion Division (RACD). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations (DCMR), 14 DCMR §§ 3800-4399 (2004), govern the proceedings.

I. THE PROCEDURES

On June 22, 2000, the Tenant filed a Tenant Petition (TP) 24,979. On June 27, 2001, the Commission issued a decision and order, which remanded this case to the Rent Administrator. On April 29, 2003, the Commission issued another decision and order, which remanded this case to the Rent Administrator.

On June 1, 2004, Hearing Examiner Saundra McNair, issued an order which dismissed the tenant petition of Gbuta-Kla Bedell, Tenant, holding res judicata applied. There were no findings of fact or conclusions of law in the order which dismissed the Tenant's petition. On June 18, 2004, the Tenant filed a notice of appeal and the Commission held its hearing on November 9, 2004.

II. THE ISSUES

1. Whether Hearing Examiner failed to inform the Tenant of the Housing Provider's motion to dismiss the tenant petition and made the Tenant unprepared for the April 12, 2004 hearing on the motion to dismiss.

2. Whether the Housing Provider's attorney, Morris Battino, was required to take an oath at the hearing.

3. Whether during the hearing Attorney Battino made untrue statements, and the Examiner failed to allow the Tenant to challenge them.

4. Whether the Hearing Examiner discouraged the Tenant from seeking a continuance, because Mr. Handy had too many requests for a continuance.

5. Whether the Hearing Examiner gave Attorney Battino legal advice.

6. Whether the Hearing Examiner would not let the Tenant complete a statement or answer, and interrupted him by stating he could not remember, but did not interrupt the Housing Provider, who also could not remember.

7. Whether Examiner McNair showed bias against the Tenant when she did not allow the Tenant to present evidence of the entire case and limited him to the motion to dismiss.

8. Whether res judicata applied to the Tenant's case.

9. Whether error occurred when the March 4, 2004 hearing was cancelled and a mediation hearing was scheduled that date.

10. Whether the Housing Provider's motive was to evict the Tenant.

III. THE LAW AND DISCUSSION OF THE ISSUES

1. **Whether Hearing Examiner McNair failed to inform the Tenant of the Housing Provider's motion to dismiss the tenant petition and made the Tenant unprepared for the April 12, 2004 hearing on the motion to dismiss.**

9. **Whether error occurred when the March 4, 2004 hearing was cancelled and a mediation hearing was scheduled that date.**

Issues 1 and 9 are interrelated based on the writing of the Tenant in Issue 9. In issue 9, the Tenant wrote about March 4 and April 12, 2004:

> On March 4, 04, [sic] when I arrived for a full hearing on the issues that I raised in my complaint; Mr. Battino had arranged with one Ms. Smith to cancel the March 4th hearing instead arranged to have a mediation hearing without informing me. When I got to the hearing, the Examiner was very upset and I might add very angry that I was not informed about the mediation hearing thus causing him to cancel the March 4 hearing to April 12, 04 [sic]. (emphasis added.)

Since the March 4, 2004 hearing was cancelled and continued to April 12, 2004, more than a month later, the Hearing Examiner did not cause the Tenant to be unprepared for the April 12, 2004 hearing. The Tenant had more than an extra month to prepare for the April 12, 2004 hearing. It is noteworthy that on March 19, 2004, the Housing Provider filed the motion to dismiss with a certificate of service to the Tenant, Record (R.) at 275, and on March 23, 2004, the Tenant filed an opposition to the motion to dismiss, R. at 278. Therefore, it does not appear that events leading up to the April 12, 2004 hearing caused the Tenant to be unprepared, especially since he had an extra month to prepare for the April 12, 2004 hearing. Therefore, these issues are denied and the hearing examiner is affirmed.

2. **Whether the Housing Provider's attorney, Morris Battino, was required to take an oath at the hearing.**

In issue two (2) the Tenant wrote:

> Examiner McNair refused to give Mr. Morris Battino, Esq. [Attorney for the Housing Provider] the oath even though she [sic] him to participate fully in the hearing but she did gave [sic] the oath to Mr. Clark [Housing Provider]. When I reminded her that Mr. Clark's Attorney did not take the oath; she said he didn't have to.

In the present appeal, this issue does not identify what statements of counsel were objectionable in the record, and should have been treated as testimony under oath. Accordingly, this issue does not meet the requirements of 14 DCMR § 3802.5 (2004), which requires a clear and concise statement of error. See Norwood v. Peters, TP 27,678 (RHC Feb. 3, 2005) (where the Commission denied appeal issues because they were vague); Parreco v. Akassy, TP 27,408 (RHC Dec. 8, 2003); Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000); Tenants of 2480 16th St., N.W. v. Dorchester Hous. Ass'n, CI 20,739 & CI 20,741 (RHC Jan. 14, 2000) (review denied because the appealing party failed to provide a clear statement of the alleged error in the decision and order as required by the Commission's regulation, 14 DCMR § 3802.5.); Hampton Hous. North Tenants' Assoc. v. Shapiro, CI 20,669 (RHC Feb. 9, 1998) (where the Commission denied an issue as too vague to decide). The court in Hutchinson v. District of Columbia Office of Employee Appeals, 710 A.2d 227 (D.C. 1998) stated, "appellate review is limited to matters appearing in the record before us, and we cannot base our review of errors upon statements of counsel which are unsupported by that record." Cited in Hagner Mgmt. Corp. v. Brookens, TP 3788 (Feb. 4. 1999).

Moreover, witnesses are given the oath, not attorneys or representatives. See 14 DCMR § § 4000.3; 4005.1 (2004), which require an oath for persons who will testify at

the hearing, not representatives or attorneys. Therefore, this issue is dismissed and the hearing examiner is affirmed.

3. **Whether during the hearing Attorney Battino made untrue statements, and the Examiner failed to allow the Tenant to challenge them.**

This issue, like issue two (2) above, does not state a clear and concise statement of error as required by 14 DCMR § 3802.5 (2004). There is no identity of the untrue statements, allegedly made by Attorney Battino. Accordingly, this issue is dismissed and the hearing examiner is affirmed.

4. **Whether the Hearing Examiner discouraged the Tenant from seeking a continuance, because Mr. Handy had too many requests for a continuance.**

This issue is similar to issues two and three, it does not describe what "discouraged" is and does not explain what error occurred. This issue is dismissed and the hearing examiner is affirmed.

5. **Whether the Hearing Examiner gave Attorney Battino legal advice.**

For issue five (5) the Tenant wrote:

> Examiner McNair gave Mr. Battino legal advice during the hearing on April 12th, 04 [sic] by suggesting to him [that he] focus on what he might have meant, when he wrote the settlement agreement as suppose [sic] to actual fact he wrote **when he did not mention the other concerns in my complaint**. In other words, Examiner McNair was telling Mr. Battino **you meant this or that. I felt she was putting words into his mouth**. (emphasis added).

The hearing examiner may not give legal advice. See Tenants of 829 Quincy St., N.W. v. Bernstein Mgmt. Co., TP25,072 (Sept. 22, 2004) at 17-19. This issue claims legal advice was given by the hearing examiner to the Housing Provider's counsel, who did not mention the concerns in the Tenant's complaint.

It was not the Housing Provider's counsel's duty or burden of proof to discuss the Tenant's complaint. "The proponent of a rule or order shall have the burden of establishing each finding of fact essential to the rule or order by a preponderance of evidence." 14 DCMR § 4003.1 (2004). This means the Tenant had the burden of proof, not the Housing Provider or his counsel, on the concerns in the Tenant's complaint. Again, this issue is too vague to decide, because the legal advice is not identified in the issue. This issue is denied and the hearing examiner is affirmed.

6. **Whether the Hearing Examiner would not let the Tenant complete a statement or answer, and interrupted him by stating he could not remember, but did not interrupt the Housing Provider, who also could not remember.**

This issue is too vague to decide. It does not identify what statement or answer or interruption was involved. Accordingly, it violates 14 DCMR § 3802.5 (2004), which was discussed in issues 2, 3, and 4. See Mersha v. Town Ctr. Ltd. P'ship, TP 24,970 (RHC Dec. 21, 2001) where the Commission dismissed several statements written by the Tenant as issues, because they did not comply with § 3802.5. Accordingly, this issue is dismissed and the hearing examiner is affirmed.

7. **Whether Examiner McNair showed bias against the Tenant when she did not allow the Tenant to present evidence of the entire case and limited him to the motion to dismiss.**

For issue 7 the Tenant wrote:

> In the Examiner's findings on page 3 paragraph 4, she stated that "the petitioner must carry the burden of proof of proving his or her entitlement to the relief requested; and if the petitioner fails to put sufficient competant [sic] evidence into the record to support the claim, the petition should be dismissed with prejudice." But Examiner McNair would not let me go into the entire case only to talk about the motion to dismiss. If she stopped me from presenting evidence and adviced [sic] that I present them in 10 (ten) days which I did and she would not comment on my evidence; I view this as bias against me. (emphasis added.)

The Tenant does not describe what evidence was excluded involving his "entire case" when he talked about the motion to dismiss. Next, the Tenant stated that he presented the evidence within ten (10) days to the hearing examiner. These statements do not show error as required by 14 DCMR § 3802.5 (2004). This issue is denied and the hearing examiner is affirmed.

8. Whether res judicata applied to the Tenant's case.

"Res judicata is an affirmative defense that must be pleaded and established by the proponent." Johnson v. District of Columbia Rental Hous. Comm'n, 642 A.2d 135, 139 (D.C. 1994) cited in Hines v. Brawner Co., TP 27,707 (RHC Sept. 7, 2004) (where the Commission reversed the hearing examiner because of the lack of identity of parties). "To evaluate a claim of preclusion, the trier of fact must 'have before it the exhibits and records involved in the prior cases....'" Id. at 139 citing Block v. Wilson, 54 A.2d 646, 648 (D.C. 1947). When the parties are the same, res judicata applies to not only the claim that was decided, "but also as to every ground which might have been presented." Henderson v. Snider Bros., Inc., 439 A.2d 481 (D.C. 1981) (emphasis added). "Under the doctrine of claim preclusion or res judicata, when a valid final judgment has been entered on the merits, the parties or those in privity with them are barred, in a subsequent proceeding, from relitigating the same claim or any claim that might have been raised in the first proceeding (emphasis added)." Davis v. Davis, 663 A.2d 499, 501 (D.C. 1995); cited in CT Assocs. v. Campbell, TP 27,231 (RHC Aug. 15, 2003); cited in Mooskin v. Bourge, TP 27,809 (RHC Dec. 11, 2003) (where the Commission compared the two relevant cases and determined the allegations in both were identical. That raised the res judicata defense.) The order dismissing the Tenant's petition does not discuss and

compare the issues that were raised or could have been raised in other litigation between these parties. In fact, the order contains error in stating that all issues related to the registration of the property, rent increases, and rent ceiling concerns could have been adjudicated by the Tenant in the Superior Court. Order at 3. However, the hearing examiner later stated in the order, a "Superior Court judge may not undertake to adjudicate the validity of a rent increase, Kennedy v. District of Columbia Rental Hous. Comm'n, 709 A.2d 94 n.1 (D.C. 1998) (citing Drayton v. Porestsky Mgmt., Inc., 462 A.2d 1115 (D.C. 1983))." Order at 5. The problem with the hearing examiner's analysis is that there are no comparisons of dates and specific issues identified as being precluded by res judicata.

The District of Columbia Administrative Procedure Act, D.C. OFFICIAL CODE § 2-509(e) (2001) 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 and conclusions of law 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 by the Mayor or the agency, as the case may be, to each party or to his attorney of record. (emphasis added).

The DCAPA requires findings of fact on each contested and material factual issue. Daro Realty, inc. v. District of Columbia Zoning Comm'n, 581 A.2d 295 (D.C. 1990);

Braddock v. Smith, 711 A.2d 835, 838 (D.C. 1998). Conclusions of law must flow rationally from the findings of fact. Perkins v. District of Columbia Dep't of Employment Servs., 482 A.2d 401 (D.C. 1984). In this appeal, there are no findings of

fact or conclusions of law on the contested issue of whether res judicata applies to the facts of this appeal. Lack of findings of fact and conclusions of law compels remand. Braddock v. Smith, 711 A.2d 835, 838 (D.C. 1998); Hedgman v. District of Columbia Hackers' License Appeal Bd., 549 A.2d 720, 723 (D.C. 1988). Since the Commission is an appellate reviewing body, assuming findings of fact and conclusions of law are outside the jurisdiction of the Commission. Meir v. District of Columbia Rental Accommodations Comm'n, 372 A.2d 566, 568 (D.C. 1977). Accordingly, this issue is granted and remanded for findings of fact and conclusions of law on res judicata on the existing record. See Butler v. Toye, TP 27,262 (RHC Dec. 2, 2004).

10. Whether the Housing Provider's motive was to evict the Tenant.

The Tenant did not raise an issue of eviction in his tenant petition. Therefore, the Housing Provider had no notice of this issue and the Commission cannot consider this issue on appeal. See Parreco v. District of Columbia Rental Hous. Comm'n, No. 03-AA-1488 (D.C. Oct. 27, 2005). This issue is dismissed and the hearing examiner is affirmed.

IV. THE CONCLUSION

Issues 1 and 9 related to the motion to dismiss were denied, because the continuance of the hearing to April 12, 2004, gave the Tenant more time to prepare for the hearing and no error was shown by the Tenant on the mediation hearing. Issue 2 was denied, because attorneys are not required to take an oath, and the Tenant did not show that the attorney testified at the hearing. Issue 3 was denied, because the Tenant did not identify the alleged untrue statement by counsel. Issue 4 was denied, because the Tenant did not explain what the word "discouraged" means. Issue 5 was denied, because the Tenant did not state the legal advice he believed the hearing examiner gave to attorney

Battino. Issue 7 was denied, because the Tenant did not show he was denied the opportunity to present his case. Issue 8 on res judicata was granted, because there were no findings of fact and conclusions of law on res judicata and because there was no discussion of the issues that were common between this case and the cases in the Superior Court between these parties, that would preclude a decision by the hearing examiner on issues raised by the Tenant in the tenant petition. Issue 10 was dismissed, because no issue of eviction was raised in the tenant petition.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004) provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission … may seek judicial review of the decision … by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W.
6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 24,979 was mailed by priority mail, with confirmation of delivery, postage prepaid this **19th day of April, 2006**, to:

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