DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 26,119

In re: 1825 18th Street, N.W., Unit F

Ward Two (2)

ERIN MARIE DEY
Tenant/Appellant

v.

L. J. DEVELOPMENT, INC.
Housing Provider/Appellee

ORDER ON MOTION FOR AWARD OF ATTORNEY'S FEE
and
SUPPLEMENTAL MOTION FOR AWARD OF ATTORNEY'S FEE

November 17, 2003

BANKS, CHAIRPERSON. On August 29, 2003, the Commission issued its decision in this appeal. On September 17, 2003, counsel for Erin M. Dey, Tenant, filed a motion for reconsideration, which asserted that the Commission erred in its decision by not ruling that the hearing examiner erred by not awarding treble damages. On October 15, 2003, the Commission issued an order, which denied the Tenant's motion for reconsideration. In addition, on September 17, 2003, counsel for Erin M. Dey, Tenant, filed a motion for an award of an attorney's fee in the amount of $9,500.00 with a request for a 25% enhancement to $11,875.00. L. J. Development, Inc., Housing Provider, did not file an opposition to either motion.[1] On October 28, 2003, counsel for the Tenant

[1] On October 14, 2003, counsel for the Housing Provider filed a motion to enlarge the time to file oppositions out of time or late file oppositions to the motions filed by Tenant's counsel, and a motion to late file a motion for reconsideration. Tenant's counsel filed an opposition, and the motion was denied in the Commission's order dated October 29, 2003. The Commission's order stated that counsel for the Housing Provider could timely file an opposition to the Tenant's supplemental motion for attorney's fee, which was filed by the Tenant on October 28, 2003. On November 6, 2003, new counsel for the Housing Provider filed an opposition to the Tenant's motion for attorney's fee, and on November 12, 2003, counsel for the Tenant filed an objection to the opposition.

filed a supplemental motion for an award of attorney's fee requesting an additional award of $3,037.50, for the motion for reconsideration of the Commission's decision on treble damages, oppositions to motions filed by the Housing Provider's counsel, and for preparing the supplemental motion for attorney's fee. On November 6, 2003, the Housing Provider's counsel filed an opposition to the motion for attorney's fees, and on November 12, 2003, counsel for the Tenant filed an objection to the opposition, stating that the opposition was to both the motion and supplemental motion for attorney's fees, rather than to the supplemental motion, as allowed by the Commission's order dated October 29, 2003. In accordance with the Commission's order dated October 29, 2003, the Commission holds the Housing Provider's opposition applys only to the supplemental motion for attorney's fee.

I. THE COMMISSION'S ORDER

The Rental Housing Act of 1985, D.C. OFFICIAL CODE § 42-3509.02 (2001), provides for attorney's fees. It states, "The ... Rental Housing Commission ... may award reasonable attorney's fees to the prevailing party in any action under this chapter ...." Prevailing tenants are entitled to a presumption of an award of attorney's fee. Tenants of 500 23rd St., N.W. v. District of Columbia Rental Hous. Comm'n, 617 A.2d 486 (D.C. 1992). The Commission's rules governing attorney's fees are at 14 DCMR § 3825, D.C. Reg. 684 (Feb. 6, 1998).

On the first issue, whether the Tenant is the prevailing party, Tenant's counsel asserted that the Tenant was the prevailing party. The Commission reviewed its August 29, 2003 decision and noted that the Tenant raised four issues on appeal. However, the Tenant prevailed on only three of the four issues. The Tenant did not prevail on the issue of treble damages in the Commission's decision or on the issue of treble damages in the

Commission's order on reconsideration. Thus the Tenant prevailed on three (3) of the five (5) issues, since the issue of treble damages was submitted twice – first in the notice of appeal and second, in the motion for reconsideration. The merits of the Housing Provider's appeal issues were not considered by the Commission, because the notice of appeal was from the hearing examiner's order on reconsideration, and orders on motions for reconsideration are not appealable. 14 DCMR § 4013.3 (1991). Consequently, those issues were dismissed sua sponte for lack of jurisdiction by the Commission without legal argument from the Tenant to dismiss them. Dey v. L. J. Development, Inc., TP 26,119 (RHC Aug. 29, 2003) at 10-11. Therefore, the Tenant did not "prevail" on the merits of the issues in the Housing Provider's notice of appeal, because the Commission dismissed those issues and they were not considered. The Commission concludes since the Tenant did not prevail on all issues before the Commission, the Commission must scrutinize the hours and the rate of the attorney's fee requested in the motion and supplemental motion for attorney's fee, to avoid compensation for legal work related to treble damages, the issue the Commission denied twice.

The second issue is the rate per hour for the attorney's fee. The Commission has the discretion to determine the reasonable rate per hour and reasonable number of hours for calculation of attorney's fees. District of Columbia v. Hunt, 525 A.2d 1015, 1017 (D.C. 1987); Hampton Courts Tenants Assoc. v. District of Columbia Rental Hous. Comm'n, 599 A.2d 1113 (D.C. 1991). "The starting point shall be the lodestar, which is the number of hours reasonably expended on a task multiplied by a reasonable hourly rate." 14 DCMR § 3825.8. The calculation of an attorney's fee begins with the lodestar, which is the number of hours reasonably expended on a task multiplied by a reasonable hourly rate. Hampton Courts, 599 A.2d at 1115 n.7; Ungar v. District of Columbia

Rental Hous. Comm'n, 535 A.2d 887, 892 (D.C. 1987) cited in Town Center Mgmt. Corp. v. Pettaway, TP 23,538 (RHC Feb. 29, 2003) at 14.

Tenant's counsel has not provided data on prevailing rates for attorney's fees in the community for rent control cases. See Town Center Mgmt. v. Pettaway, TP 23,538 (RHC Feb. 29, 1996) (where one counsel provided a range of fees). The Tenant's counsel has not provided data to support the requested rate per hour for his attorney's fee, nor the increase in his attorney's fee from $400.00 per hour in 2002, as stated in the motion for attorney's fee, to $450.00 per hour in 2003, as stated in the supplemental motion for attorney's fee. The Commission took official notice of its prior decisions on attorney's fees, which involved the Tenant's counsel. In Carter v. Bassett, TP 23,535 (RHC Dec. 11, 1998), the Commission allowed the rate per hour for the attorney's fee to increase twenty-five dollars ($25.00) between 1994 and 1998, a period of five (5) years, ($255.00 for 1994, $265.00 for 1995, and $280.00 for 1998). Therefore, in the instant appeal, the Commission increased the attorney's fee twenty five dollars ($25.00) for the next five (5) years, between 1999 and 2003 for an attorney's fee of $300.00 for 2002, and $305.00 in 2003.[2]

The third issue is reasonable hours billed. The hours billed for each year appear to be reasonable for the services provided and stated on the Housing Provider's chart for the attorney's fee award. Therefore, the Commission will accept those hours. However, the Commission must reduce the hours, which it assigns to the services for treble damages, because the Tenant did not prevail on treble damages. Specifically, on the issue of treble damages in the notice of appeal, the Commission's decision, and the

[2] The progression for the attorney's fees follow: 1999 is $285.00; 2000 is $290.00; 2001 is $295.00; 2002 is $300.00; and 2003 is $305.00.

motion for reconsideration, where the Tenant did not prevail, counsel cannot be compensated by an award of an attorney's fee.

In 2002, Tenant's counsel billed 23.75 hours, and did not delineate the time spent on each issue. There were four (4) issues in the notice of appeal and four issues in the Commission's decision. The Tenant prevailed on only three of the four issues, or alternatively stated, prevailed on 75% of the issues and did not prevail on 25% of the issues. The Commission reduced the 2002 hours billed by 25% to discount for the treble damages issue where the Tenant did not prevail. That calculation is the hours multiplied by 25% (23.75 hours x .25 = 6) equals six hours, and 23.75 hours minus 6 hours equals 17.75 hours, for compensation. For 2002, the lodestar for the Tenant's attorney fees is 17.75 hours multiplied by the 2002 attorney's fee rate per hour of $300.00. The attorney's fee award for 2002 is $5325.00.00.

Tenant's attorney also filed a supplemental motion for attorney's fee for legal services provided in the following year in the months of September 2003 and October 2003. For the motion for attorney's fee based on legal services in 2002, the Commission disallowed the attorney's fee request for treble damages, because the Tenant did not prevail on that issue. Similarly, for 2003, the Commission *disallowed* the following, from the Tenant's attorney's chart for attorney's fees, based on the Commission's ruling that the Tenant did not prevail on treble damages:

DATE	HOURS WORKED	DESCRIPTION
9/03/03	1.00	Review RHC Decision; research whether treble damages must be requested in Tenant Petition or during hearing.
9/09/03	0.75	Draft motion for reconsideration [treble damages]
9/10/03	2.25 (1.41 disallowed) (.85 allowed)	Draft motion for reconsideration [treble damages]; draft motion for attorney's fee[3]
10/28/03	.75 (.19 disallowed or 25%, disallowed and .56 allowed)	Draft supplemental motion for attorney [sic] fees[4]
	3.35 Total Hours Disallowed 1.41 Total Hours Allowed	

The additional *allowed* charges are as follows:

DATES	HOURS WORKED	DESCRIPTION
10/15/03	1.25	Review & draft opposition to Housing Provider's motion for enlargement of time.
10/16/03	.75	Draft opposition to housing provider's motion for enlargement of time.
	2.00 Hours Allowed 1.41 Hours on chart above 3.41 Grand Total Hours Allowed	

[3] Counsel for the Housing Provider billed for both the motion for reconsideration on treble damages and the motion for attorney's fee, which included time to prepare the motion for reconsideration on the issue of treble damages. The Tenant did not prevail on the motion for reconsideration for treble damages, therefore, one half of the time on this date, September 10, 2003, is allocated to that motion, and twenty-five percent (25%) of the remaining time for the motion for attorney fee is allocated to the motion for attorney's fee request to be compensated for the failure to prevail on treble damages, which was one of the four issues on appeal and the only issue in the motion for reconsideration, which is totally disallowed for an attorney's fee award. That calculation is (2.25 (hours billed) / 2 (one half) =1.125 hours); (1.125 (hours) x .25 = .28 (hours)), which is subtracted from the 1.125 hours (1.125 - .28 = .85), and leaves .85 hours for compensation, and (1.125 + .28) is 1.41 hours disallowed for compensation.

[4] The Commission, again, disallowed time related to the Tenant's motion for reconsideration on the issue of treble damages, because the Tenant did not prevail on that issue. There were Housing Provider motions, which required opposition, and the Tenant's counsel can be compensated for the times allocated to those motions, as shown in the second chart above.

The lodestar for the Tenant's attorney's fee for 2003 is 3.41 hours multiplied by the $305.00 rate per hour, for a lodestar attorney's fee award of $1040.05 for 2003.

Counsel for the Tenant addressed the twelve (12) factors (issues) stated in Frazier v. Central Motors, Inc., 418 A.2d 1018, 1025 (D.C. 1980), as guidelines for a reasonable award of attorney's fee, and requested an enhancement of the attorney's fee award. The first factor is time and labor required. Tenant's counsel submitted his time for services and the cost of those services in a table for the Commission's consideration. The Commission reduced both the number of hours and the rate per hour requested for the attorney's fee award, as explained in issues one – three above. The second factor is the novelty and difficulty of the question (issues in the appeal). Tenant's counsel stated, "the Tenant claims no enhancement of fees due to novel or difficult issues presented by this case." Motion at 5. Factor three (3) is the skill requisite to perform the legal service properly. Counsel asserted that he was a senior lawyer in his law firm with 30 years of legal experiences, and participated in rent control issues since 1974. Factor four (4) is the preclusion of other employment due to the acceptance of the case. Counsel for the Tenant stated no claim is made under this factor. Motion at 5.

Factor five (5) is the customary fee. Tenant's counsel stated his fee of $400.00 per hour was reasonable based on a court of appeals case, Ginberg v. Tauber, 678 A.2d 543, 552 (D.C. 1996) cert. denied 117 S. Ct. 738 (1997), where counsel in that case was awarded $325.00 per hour. Indeed, Tenant's counsel suggested that an enhancement of his fee was appropriate since the Ginberg case was decided six years ago. The Commission in Butt v. Vogel, TP 22,806 (RHC Jan. 30, 1998) refused to follow and accept the fee $325.00 per hour in Ginberg, because "Ginberg involved a *commercial* landlord and tenant case rather than 'a similar case' involving residential landlords and

tenants under the Act." Butt at 10. Moreover, the Commission for a second time in Carter v. Bassett, TP 23,535 (RHC Dec. 11, 1998) specifically rejected the Ginberg rate of $325.00 per hour for the attorney's fee. Accordingly, the Commission will follow that precedent in this case. In addition, Tenant's counsel urged that his fee was reasonable based on his many experiences before the Commission and the Office of Adjudication in rent control cases. There is no opposing evidence in the record on the Tenant's counsel's experiences and knowledge of rent control law and issues.

Factor six (6) is whether the fee is fixed or contingent. The fee was fixed and based on an hourly rate of $400.00 per hour.[5] Factor seven (7) is the limitations imposed by the client or the circumstances. None are asserted in this appeal. Motion at 5. Factor eight (8) is the amount involved and the results obtained. The Commission did not award treble damages, which resulted in a lesser amount involved than if trebled damages were awarded. On the other hand, the appeal was remanded for an award of interest to the date of the decision, which increased the total award of $8,886.50 to the Tenant. The ninth (9th) factor is the experience, reputation and ability of the attorney. This factor is related to the third (3rd) factor involving the skill of the attorney. The experience, ability, and skill of the Tenant's attorney is one of the largest in number of years, over 30, and his experiences are numerous in the rent control specialty area of law, as stated in paragraphs 1-4 in the text of his statement of services in support of the motion for award of attorney's fee attached to the motion.

The eleventh (11th) factor is the undesirability of the case. None is claimed.

[5] In the supplemental motion of Tenant for award of attorney's fee the hourly rate increased to $450.00 without explanation.

The twelfth (12th) factor is awards in similar cases. Counsel for the Tenant did not submit awards in similar cases, although he cited the cases of Town Center Mgmt. v. Pettaway, TP 23,538 (RHC Feb. 29, 1996) and Butt v. Vogel, TP 22,806 (Jan. 30, 1996) (where the Commission considered the hourly rates proferred by Tenant's counsel). In Butt Tenant's counsel was awarded the rate of $265 per hour for 1995. In Carter v. Davis, TP 24,535 (RHC Dec. 11, 1998) Tenant's counsel was awarded an attorney's fee of $255 for 1994, $265 for 1995, and $280.00 for 1998. In this appeal, the Commission increased the attorney's fee beginning with 1999 to allow for identical incremental increases in the attorney's fees, as allowed in Carter.

II. CONCLUSION

Counsel for the Tenant is awarded $5325.00 on the motion for an award of attorney's fees for legal services performed in 2002 before the Commission issued its decision, and $1040.05 on the supplemental motion for an award of attorney's fees for services performed in 2003.[6] The total attorney's fee award is $6365.05. Based on the discussion of the 12 factors (issues) above, the Commission denies that part of the Tenant's motion and supplemental motion for attorney's fee for an increase above the

[6] The size of the increase of the attorney's fee for 2003 in the supplemental motion for attorney's fee is contrasted to the Housing Provider's opposition wherein counsel for the Housing Provider states he has similar experiences with rent control cases, however, he currently charges $265.00 per hour, which is $40.00 per hour less than the $305.00 per hour, which the Commission granted in this order for the supplemental motion for attorney's fee for 2003 legal services to the Tenant. See Memorandum of Points and Authorities in Support of Housing Provider's Opposition to Motion of Tenant/Appellant for Award of Attorney's Fees, at n.2.

lodestar amount awarded by the Commission. This appeal was not a novel case, nor a complex case that justified an enhancement of the attorney's fee award.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), 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's Rule, D.C. App. R. 15(a), provides in part: "Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thirty days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed ... and by tendering the prescribed docketing fee to the clerk." 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 Order on Motion for Attorney's Fee and Supplemental Motion for Attorney's Fee in TP 26,119 was served by priority mail, with delivery confirmation, postage prepaid, this **17th day of November, 2003**, to:

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