

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,033

In re: 5912 9th Street, N.W., Unit 3

Ward Four (4)

GAIL B. STONE
Tenant/Appellant

v.

RAVENELL KELLER
MARGARET KELLER
Housing Providers/Appellees

DECISION AND ORDER

May 19, 2004

BANKS, CHAIRPERSON. This case is on appeal to the Rental Housing 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 (1991) govern the proceedings.

I. THE PROCEDURES

On March 2, 2001, Gail B. Stone, Tenant, filed Tenant Petition (TP) 27,033 against Mr. and Mrs. Ravenell Keller, Housing Providers, alleging: 1) the rent increase was larger than the amount of increase allowed by law, 2) the housing provider failed to file proper rent increase forms, 3) the rent charged exceeds the legally calculated rent

ceiling, 4) the rent ceiling filed with RACD is improper, 5) the Housing Providers took a rent increase when substantial housing code violations existed, 6) the rent was increased while a written lease, prohibiting such increases, was in effect, 7) the building in which the rental unit is located is not properly registered with RACD, 8) services and facilities provided in connection with the rental unit were substantially reduced, 9) coercion was used by the Housing Providers to obtain signatures on a Voluntary Agreement, 10) retaliation was directed toward the Tenant in violation of the law, 11) the Tenant received a notice to vacate which did not comply with the law, and 12) the Housing Providers violated the housing regulations.

On September 30, 2002, Hearing Examiner Terry Michael Banks issued the decision and order. It contained the following:

Findings of Fact:

1. Petitioner moved into Apartment 3 of the housing accommodation on or about September 1, 1997. Her initial rent was \$550.
2. Housing Deficiency Notices were issued with respect to Petitioner's unit on December 3, 1998, March 5, 1999, and July 12, 1999. Housing Violation Notices were issued on January 7, 1999 and July 12, 1999.
3. The December 3, 1998 Notice was abated on January 25, 1999. The January 7, 1999 Notice was abated the next day.
4. The three remaining Notices were cancelled on July 19, 1999 due to Petitioner's lack of cooperation with the housing inspector.
5. On February 2, 1999 the parties settled a Complaint for Possession case in D.C. Superior Court, No. LT-43737-98, thereby resolving outstanding disputes over housing violations.
6. On April 17, 1999, Respondents gave Petitioner notice of a rent increase, from \$550 to \$650, effective June 1, 1999. The notice also raised Petitioner's rent ceiling from \$895.40 to \$911.52.

7. Throughout 1999 and 2000, Petitioner consistently failed to provide Respondents access to her unit to effect repairs.
8. On November 24, 2000, Respondents filed a Notice to Vacate for Petitioner's failure to pay rent and failure to provide Respondent access to her unit.

Decision at 4.

Conclusions of Law

1. Respondents did not take a rent increase larger than allowed under the Act.
2. Respondents did not take a rent increase while Petitioner's unit was in substantial violation of housing regulations.
3. Petitioner failed to establish, by a preponderance of the evidence, that services and facilities provided in connection with the rental of the unit have been substantially reduced.
4. Petitioner failed to establish, by a preponderance of the evidence, that Respondent served a Notice to Vacate that violates the Act.

Decision at 7.

II. THE NOTICE OF APPEAL

On October 18, 2002, counsel for the Tenant filed a notice of appeal in the Commission. The notice of appeal stated the following issues:

1. [Whether] [t]he Examiner erred by failing to admit Tenant exhibits number[ed] 4, 9, and 10.
2. [Whether] [t]he Examiner erred by failing to address the annual rent charge increase is [sic] controlled by the CPI[W].
3. [Whether] [t]he Examiner erred by failing to address the failure of the petitioner to receive notice of the abatement pursuant to § 42-3502.08(b)(1).
4. [Whether] [t]he Examiner erred by failing to address the issue of the Housing Provider's failure to mail or post a copy of the Certificate of Election of Adjustment of General Applicability to the Tenant.
5. [Whether] [t]he evidence does not support the findings of fact number 5 that settlement of 98 [LT] 43737 resolved "outstanding disputes over housing violations."

6. [Whether] [t]he evidence does not support the findings of fact number 7 that the Tenant consistently failed to provide the Housing Providers with access to the unit.
7. [Whether] [t]he Examiner erred when he insisted that additional notice of outstanding code violations was to be given to the Housing Providers after settlement of 98 [LT] 43737 and/or the abatement/cancellation notice.

Notice of Appeal at 1 & 2.

The Commission held its appellate hearing on March 11, 2003. At the Commission's hearing, the Commission ruled, as a preliminary matter, that counsel for the Tenant could submit three exhibits, numbered Petitioner's exhibits 4, 9, and 10, which were missing from the certified RACD record for review.¹ On March 18, 2003, the Tenant's counsel filed in the Commission exhibits 9 and 10, and noted he could not locate exhibit 4.

III. THE COMMISSION'S DECISION

A. [Whether] [t]he Examiner erred by failing to admit Tenant exhibits number[ed] 4, 9, and 10.

The decision and order states that Tenant exhibits numbered 4, 9 and 10 were not admitted into evidence. Decision at 2. The Tenant raised the rulings not to admit those exhibits into evidence as error on appeal. The Commission listened to the tapes of the

¹ The Commission rule, 14 DCMR § 3807.5 (1991), states, "[t]he Commission shall not receive new evidence on appeal." See dismissal of appeal in Steelman v. Uzomah, TP 27,629 (RHC July 3, 2003) (where the Commission dismissed the notice of appeal, because it requested the introduction of new evidence, consisting of photographs and a letter, which the Tenants alleged were not available to the Tenants during the hearing.) In the instant appeal, the Commission allowed counsel to file the missing exhibits to complete the hearing record for review. By allowing the filing of the exhibits, the Commission did not reverse the hearing examiner nor make any ruling on the admissibility of the exhibits. They were allowed solely for completion of the hearing record for review by the Commission to determine whether the exhibits were admitted into evidence, or if not admitted into evidence, for review of the ruling. See 14 DCMR § 4007.1(c) (1991), which requires the Rent Administrator to keep a record of "[a]ll documents and exhibits offered into evidence at the hearing."

hearing and there was no indication on the hearing tapes that those exhibits were admitted into evidence.

Specifically, there is no testimony on the hearing tapes, that Tenant Exhibit [Exh.] 4 was identified, authenticated, and admitted into evidence. The Tenant does not give a reason for finding error for the failure to admit Exh. 4, which was not mentioned on the hearing tapes. Therefore, the hearing examiner is affirmed on Exh. 4.

Further, the Tenant testified at the hearing about Exhs. 9A, 9B, 9C and 9D, which were four photographs of windows in need of repair in the Tenant's rental unit. (RACD hearing tape, Aug. 22, 2002). But those photographic exhibits were not moved into evidence. Moreover, the hearing tape conflicts with the document with the designation "P#9," which counsel for the Tenant filed in the Commission on March 18, 2003, after the Commission's hearing. The document filed by Tenant's counsel and marked "P#9" reads, "3/19/01 Plastered holes under kitchen sink. Walter Boyce." He was one of the repair men hired by the Housing Providers. There is a conflict between the hearing tape, which indicated four (4) photographs were the subjects of Tenant's Exh. 9, and the filed document, P#9, stating repair to holes under the kitchen sink. Thus, the filed document cannot be considered by the Commission, since it would be deemed new evidence, which the Commission's rules prohibit. See n.1. Accordingly, the hearing examiner is affirmed.

Finally, the Commission listened to the tape of the hearing for Tenant's Exh. 10. On the hearing tape, Exh. 10 was a document shown to Mr. Keller, Housing Provider, who identified it as a document which indicated that the hot water heater for the Tenant's unit was changed on February 10, 2001. (RACD hearing tape Aug. 22, 2002). The

document Tenant's counsel filed in the Commission reads in handwritten text, "2-10-01 Changed hot water heater [some text illegible]." That document had a signed and printed signature for Walter Boyce. The document on the hearing tape and the document filed by Tenant's counsel in the Commission seem to be the identical document. However, there is no indication on the hearing tape that this document was moved into evidence. The notice of appeal does not give a reason for finding error, because Exh. 10 was not admitted into evidence. Therefore, the hearing examiner is affirmed.

B. [Whether] [t]he Examiner erred by failing to address [whether] the annual rent charge increase is controlled by the CPI[W].

This issue, as stated in the notice of appeal, is contrary to law in the Act, which states that the annual "rent ceiling" increase [not rent charged] is based on the "annual adjustment of general applicability in the rent ceiling of a rental unit under § 42-3502.06." D.C. OFFICIAL CODE § 42-3502.02 (2001). Pursuant to D.C. OFFICIAL CODE § 42-3502.06(b) (2001):

On an annual basis, the Rental Housing Commission shall determine an adjustment of general applicability in the rent ceiling established by subsection (a) of this section. This adjustment of general applicability shall be equal to the change during the previous calendar year, ending each December 31, in the Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the preceding calendar year. No adjustment of general applicability shall exceed 10%. A housing provider may not implement an adjustment of general applicability, or an adjustment permitted by subsection (c) of this section for a rental unit within 12 months of the effective date of the previous adjustment of general applicability, or instead, an adjustment permitted by subsection (c) of this section in the rent ceiling for that unit. (emphasis added.)

In addition, the Act provides that a Housing Provider may delay implementation of all or a part of a rent ceiling adjustment. The Act states in the

amendment known as the Unitary Rent Ceiling Adjustment Amendment Act of 1992 (Unitary Act):

(h) (1) One year from March 16, 1993, unless otherwise ordered by the Rent Administrator, each adjustment in rent charged permitted by this section may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment. If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.

(2) Nothing in this subsection shall be construed to prevent a housing provider, at his or her election, from delaying the implementation of any rent ceiling adjustment, or from implementing less than the full amount of any rent ceiling adjustment. A rent ceiling adjustment, or portion thereof, which remains unimplemented shall not expire and shall not be deemed forfeited or otherwise diminished.

D.C. OFFICIAL CODE § 42-3502.08(h)(1-2) (2001) (emphasis added).

Finding of fact number 6 in the decision states:

On April 17, 1999, Respondents gave Petitioner notice of a rent increase, from \$550 to \$650, effective June 1, 1999. The notice also raised Petitioner's rent ceiling from \$895.40 to \$911.52.

Decision at 4.

The Tenant's counsel does not state in the notice of appeal that the annual rent ceiling increase based on the CPI-W was not properly filed and perfected, as required by the rule, 14 DCMR § 4202.10 (1991), nor that the rule, 14 DCMR § 4205 (D.C. Reg. Feb. 6, 1998), related to the Unitary Act was violated. Nor was there testimony from the Tenant that the rent charged increase violated the Act or a relevant rule. Therefore, the Tenant did not state an issue in the notice of appeal to the Commission on what part of the Act or what part of a rule was violated, by stating: "[t]he Examiner erred by failing to address the annual rent charge increase is controlled by the CPI[W]." Under the Unitary Act, "[i]f the difference between the rent ceiling and the rent charged for the rental unit

consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.” D.C. OFFICIAL CODE § 42-3502.08(h)(1) (2001) (emphasis added).

The only testimony by the Tenant was that the rent increase was too high, without stating why the rent increase violated the Act or a relevant rule. There is nothing in the RACD hearing record to support a reversal of the increase in the rent charged the Tenant, because no evidence of error in implementing the rent increase is in the record. Accordingly, the hearing examiner is affirmed.

C. [Whether] [t]he Examiner erred by failing to address the failure of the petitioner to receive notice of the abatement pursuant to § 42-3502.08(b)(1).

Findings of fact numbered 2, 3, and 4 state:

Housing Deficiency Notices were issued with respect to Petitioner’s unit on December 3, 1998, March 5, 1999, and July 12, 1999. Housing Violation Notices were issued on January 7, 1999 and July 12, 1999.

The December 3, 1998 Notice was abated on January 25, 1999. The January 7, 1999 Notice was abated the next day.

The three remaining Notices were cancelled on July 19, 1999 due to Petitioner’s lack of cooperation with the housing inspector.

D.C. OFFICIAL CODE § 42-3502.08(b)(1) (2001) states:

(b) A housing accommodation and each of the rental units in the housing accommodation shall be considered to be in substantial compliance with the housing regulations if:

- (1) For purposes of the adjustments made in the rent ceiling in §§ 42-3502.06 and 42-3502.07, all substantial violations cited at the time of the last inspection of the housing accommodation by the Department of Consumer and Regulatory Affairs before the effective date of the increase were abated within a 45-day period following the issuance of the citations or that time granted by the Department of Consumer and Regulatory Affairs, and the Department of Consumer and Regulatory Affairs has certified the abatement, or the housing provider or

the tenant has certified the abatement and has presented evidence to substantiate the certification. No certification of abatement shall establish compliance with the housing regulations unless the tenants have been given a 10-day notice and an opportunity to contest the certification[.]

A review of the hearing tapes showed that the Tenant did not testify to lack of notice of the abatement of either the Housing Deficiency Notice or the Housing Violation Notice. See finding of fact numbered 3, stated above. Moreover, this issue was not raised below at the hearing and cannot be raised on appeal to the Commission. See 1880 Columbia Rd. Tenants' Assoc. v. District of Columbia Rental Hous. Comm'n, 400 A.2d 330, 339 (D.C. 1979); Lenkin Co. Mgmt. Inc. v. District of Columbia Rental Hous. Comm'n, 642 A.2d 1282 (D.C. 1994) (where the court stated failure to raise a claim at the agency level precludes raising it on appeal). The hearing examiner is affirmed on this issue.

D. [Whether] [t]he Examiner erred by failing to address the issue of the Housing Provider's failure to mail or post a copy of the Certificate of Election of Adjustment of General Applicability to the Tenant.

Again, this issue was not raised below at the hearing and cannot be raised on appeal. See issue C above. The hearing examiner is affirmed.

E. [Whether] [t]he evidence does not support the findings of fact number 5 that settlement of 98[LT] 43737 resolved "outstanding disputes over housing violations."

Finding of fact numbered 5 states:

On February 2, 1999 the parties settled a Complaint for Possession case in D.C. Superior Court, No. LT-43737-98, thereby resolving outstanding disputes over housing violations.

This finding of fact is limited to "thereby resolving outstanding disputes over housing violations" as of February 2, 1999. The decision and order does not discuss the

record evidence which supports “resolving outstanding disputes over housing violations” in finding of fact number 5. See Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000) (where the Commission noted that the Housing Provider did not submit transcripts and other evidence that the prior action and parties were identical to the current action before the Rent Administrator to enable res judicata to apply.) In the instant case, the Housing Provider introduced a “Complaint for Possession of Real Estate,” for LT 43737-98. Record (R.) at 128. A copy of two pages of the court entries for LT 43737-98 were in the certified file. R. 130 & 131. A copy of a praecipe in the same LT case was marked “R[] # 11,” meaning Respondent’s Exh. 11, was in the certified record. R. at 134. The praecipe dated February 2, 1999 had, in relevant part, the following handwritten note on it:

[P]lease note that today Ms[] Stone has given to Plaintiff’s counsel two money orders (MO 2353678320 for \$405; #2353678321 \$405); the judgment herein (\$160 per Judge Walton + \$93.32 costs + \$550 Feb[] rent) is hereby to be marked “PAID & SATISFIED” this date and the writ of restitution shall be quashed. Funds on deposit to be released to plaintiff. Defendant has a \$3.32 credit against March rent.

The Commission’s review of relevant documents showed nothing in the court entries, nor in the praecipe, nor in other documents, referred to resolving housing code violations. Therefore, the hearing examiner is reversed on this issue, and it is remanded to the Rent Administrator to review the existing certified record and issue a decision, which explains the record evidence and law that supports finding of fact number 5. If there is no law and record evidence to support finding of fact number 5, then it must be eliminated from the decision. A new hearing is not ordered.

F. [Whether] [t]he evidence does not support the findings of fact number 7 that the Tenant consistently failed to provide the Housing Providers with access to the unit.

The Act provides:

Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless:

- (A) The rental unit and the common elements are in substantial compliance with the housing regulations, if noncompliance is not the result of tenant neglect or misconduct. (emphasis added.)

D.C. OFFICIAL CODE § 42-3502.08 (2001).

Finding of fact number 7 reads:

Throughout 1999 and 2000, Petitioner consistently failed to provide Respondents access to her unit to effect repairs.

The Housing Providers testified that they sent the Tenant letters requesting dates for access into her unit to make repairs. Copies of those letters were introduced into evidence at the hearing. See Respondent's Exhs. 6, 7, 8, and 9. The Housing Providers also testified that the Tenant failed to respond to their letters with dates for access to her unit for repairs.

Similarly, finding of fact number 4 reads:

The three remaining Notices were cancelled on July 19, 1999 due to Petitioner's lack of cooperation with the housing inspector.

The Tenant does not assert error on finding of fact 4, which is similar to finding of fact number 7. Respondent's Exhs. 18, 19, and 22 are cancellation notices for housing code violations for lack of cooperation with the housing inspectors for access to the Tenant's unit. The testimony at the hearing showed that the Tenant failed to cooperate with both the Housing Providers and the DCRA inspectors, who cancelled housing violation notices, which they issued, due to the failure of the Tenant to cooperate and grant access to the Housing Providers to her rental unit for repairs.

It is the duty of the hearing examiner to determine the credibility of witnesses. Citywide Learning Ctr. v. William C. Smith, 488 A.2d 1310 (D.C 1985). Credibility findings are given deference and will not be disturbed, Eilers v. Bureau of Motor Vehicle Servs., 583 A.2d 677 (D.C. 1990); Gray v. Davis, TP 23,081 (RHC Dec. 7, 1993). Fazekas v. Dreyfuss, TP 20,394 (RHC Apr. 14, 1989) (where the Commission held that the hearing examiner is entrusted with a degree of latitude in deciding how to evaluate and credit the evidence presented.) In this issue, the hearing examiner had substantial record evidence to support the finding of fact that he made about the Tenant's failure to cooperate with the Housing Providers for repairs to her unit. Accordingly, the hearing examiner is affirmed, because there is substantial evidence in the record to support finding of fact number 7 that the Tenant engaged in misconduct when she failed to cooperate and grant access to her rental unit for repairs. The hearing examiner is affirmed.

G. [Whether] [t]he Examiner erred when he insisted that additional notice of outstanding code violations was to be given to the Housing Providers after settlement of 98 [LT] 43737 and/or the abatement/cancellation notice.

There is no reference in the hearing examiner's decision and order that "he insisted that additional notice of outstanding code violations was to be given to the Housing Providers after settlement of 98 [LT] 43737 and/or the abatement/cancellation notice," as stated in issue G. Accordingly, this issue is denied, and the hearing examiner is affirmed.

IV. CONCLUSION

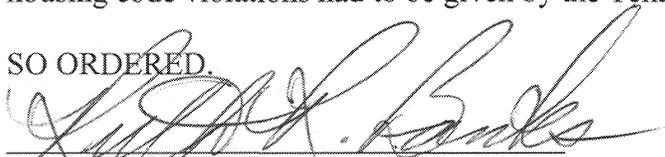
The Commission's review of the record showed no errors when Tenant Exhs. 4, 9, and 10 were not admitted into evidence. The Tenant did not produce evidence that there was error in the implementation of the increase in the rent charged effective June 1, 1999.

The Tenant did not raise before the Rent Administrator the failure to receive notice of abatement, and the failure of the Housing Providers to mail or post a copy of the Certificate of Election of Adjustment of General Applicability. Therefore, the Tenant cannot raise those issues before the Commission on appeal.

The hearing examiner did not explain how the Housing Providers' case, LT 43737-98, in the Landlord Tenant Branch of the Superior Court resolved outstanding housing code violations. That issue was reversed and remanded to the Rent Administrator for review of the existing record and law, for explanation of how the issues in the Housing Providers' case in the Landlord Tenant Branch of the Superior Court resolved the issues of housing code violations in this case.

The Commission concluded that there was substantial evidence in the record that the Tenant refused to allow the Housing Providers access to her rental unit for repairs. Finally, there was no reference in the decision that an additional notice of outstanding housing code violations had to be given by the Tenant to the Housing Providers.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER


JENNIFER M. LONG, COMMISSIONER

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 foregoing Decision and Order in TP 27,033 was mailed by priority mail, with confirmation of delivery, postage prepaid this 19th day of May, 2004, to:

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