DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,191
TP 27,192
TP 27,193

In re: 1884 Columbia Road, N.W., Units 215, 117 & 119

Ward One (1)

LENKIN COMPANY MANAGEMENT, INC.
Housing Provider/Appellant

v.

CYNTHIA MILLER
SAMUEL DURAN
MURAT OZGUN
Tenants/Appellees

DECISION AND ORDER

JUNE 4, 2004

PER CURIAM. This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission). 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. PROCEDURAL HISTORY

Cynthia Miller, who is a tenant at 1884 Columbia Road, N.W., unit 215, filed Tenant Petition (TP) 27,191 with the Rental Accommodations and Conversion Division (RACD) on July 6, 2001. In the petition, the tenant alleged that the housing provider,

Lenkin Company Management, Inc. (Lenkin), increased the rent more than the amount of increase allowed by any provision of the Act. The tenant also alleged that there was a substantial reduction in services and facilities.

Samuel Duran, who is a tenant at 1884 Columbia Road N.W., unit 117, filed TP 27,192 with RACD on July 6, 2001. In the petition, the tenant alleged that the housing provider, Lenkin, increased the rent more than the amount of increase allowed by any provision of the Act.

Murat Ozgun, who is a tenant at 1884 Columbia Road, N.W., unit 119, filed TP 27,193 with RACD on July 6, 2001. In the petition, the tenant alleged that the housing provider, Lenkin, increased the rent more than the amount of increase allowed by any provision of the Act.

Hearing Examiner Gerald J. Roper consolidated these petitions, because they contained similar issues, involved the same housing providers and accommodation. The petitions were heard on December 4, 2001. Tenants Cynthia Miller, Samuel Duran and Murat Ozgun were present and appeared pro se. The president of the tenant's association, Carolyn Llorente, also was present. The housing provider, Lenkin, was not present. After evaluating the evidence, the hearing examiner issued the following findings of fact:

1. The subject property is located at 1884 Columbia Road, N.W.

2. Cynthia Miller resides in Apartment 215 at the subject premises. Respondent increased Ms. Miller's rent charged on August 1, 2000 from $825 to $870 without notifying her of the basis for the rent increase.

3. Respondent increased Ms. Miller's rent charged on July 1, 2001 from $870 to $935 without notifying her of the basis for the rent increase.

4. Samuel Duran resides in Apartment 117 at the subject premises. The Housing Provider increased Ms. [sic] Duran's rent charged on June 1, 2001 from $1,085 to $1,165 without notifying her [sic] of the basis for the rent increase.

5. Murat Ozgun resides in Apartment 119 at the subject premises. The Housing Provider increased Ms. [sic] Ozgun's rent charged on June 1, 2001 from $1,065 to $1,165 without notifying her [sic] of the basis for rent increase.

6. Lenkin Company Management, Inc., has owned the subject premises at all relevant times and is the Respondent in this matter.

7. The Housing Provider was mailed notice of the Tenant's complaint and notice of the hearing by U.S. Priority Mail.

8. The Housing Provider has increased the rent charged to Tenants Miller, Duran and Ozgun without notifying them of the basis for the rent charged increase.

Lenkin Co. Mgmt., Inc. v. Miller, TP 27,191, (OAD Dec. 4, 2001) at 9-10. After making the findings of fact, the hearing examiner issued the following conclusions of law:

1. The Tenants have met their burden of proof that the rent increases were improper and in violation of D.C. [Official] Code § 45-3502.07.08 [sic] (2001).

2. Tenant Miller has failed to establish a substantial reduction in related service[s] to his [sic]rental unit by Respondent in violation of D.C. [Official] Code § 45-3502.11 [sic] (2001).

Id. at 10. The hearing examiner ordered the housing provider to refund rent overcharges in the amounts of $2041.00 to Miller, $1078.00 to Duran and $848.00 to Ozgun. The hearing examiner also held that there was not enough evidence to support a reduction in services claim for Tenant Miller and found for the housing provider on this issue.

On August 13, 2002, the housing provider, through counsel, filed an affidavit and a motion for reconsideration. The hearing examiner issued an order that denied the

motion on August 15, 2002. The housing provider, through counsel, appealed the hearing examiner's decision to the Commission on August 19, 2002. The Commission held an appellate hearing on March 18, 2003.

II. ISSUES ON APPEAL

The housing provider raised the following issues on appeal:

A. The Hearing Examiner wrongly refused to afford the Housing Provider, which had no prior notice of the Tenant Petitions herein, an opportunity to be heard.

B. The evidence before the Hearing Examiner failed to support his Decision ordering a rent refund.

C. The Hearing Examiner's Decision and Order of August 1, 2002 finding the Housing Provider's rent increases improper and illegal was plainly wrong, and contrary to law.

Notice of Appeal at 1.

III. DISCUSSION

A. Whether the hearing examiner refused to afford the housing provider with notice and subsequent opportunity to be heard.

The issue of notice is reoccurring in Commission cases and there is settled precedent as to the correct procedure to vacate a default judgment. In the instant case, the housing provider did not cite to any cases on the procedure for vacating a default judgment. During the Commission's hearing, the Commission conveyed to the housing provider the four factors, which the Commission must consider to determine whether to set aside a default judgment as set forth by the District of Columbia Court of Appeals: "(1) whether the movant had actual notice of the proceeding; (2) whether [the movant] acted in good faith; (3) whether the moving party acted promptly; and (4) whether a prima facie adequate defense was presented. Against these factors, prejudice to the

nonmoving party must be considered." Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478, 481 (1996) (quoting Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979)).

The first component to the Radwan test, whether there was actual notice of the proceeding, was mentioned in the notice of appeal filed by the housing provider. The appeal stated that the housing provider received neither notice of the tenant petitions nor notice of the OAD hearing. Since the instant case is a consolidated hearing of three tenant petitions, three separate mailings of the tenant petitions and of the combined notices of hearing were sent to the housing provider. The hearing examiner held a hearing on the instant petitions on December 4, 2001. The tenants appeared pro se, the housing provider did not appear and the hearing examiner received evidence. It was noted by the hearing examiner that all three mailings of notice were confirmed by the United States Postal Service (USPS) as delivered. The hearing examiner wrote in the decision and order, "[r]espondent was mailed notice of the Petitioner's complaint and notice of the hearing by U.S. Priority Mail." Decision at 10. After hearing evidence, the hearing examiner entered a default judgment in favor of the tenants, because there was substantial record evidence of delivery of notice of the hearing by priority mail.

The Commission reviewed the record to determine whether the OAD provided the housing provider with proper notice of the December 4, 2001 hearing. Pursuant to the Act, the agency has the burden of proving proper notice of the hearing:

> If a hearing is requested timely by either party, notice of the time and place of the hearing shall be furnished the parties by certified mail or other form of service which assures delivery at least 15 days before the commencement of the hearing. The notice shall inform each of the parties of the party's right to retain legal counsel to represent the party at the hearing.

D.C. OFFICIAL CODE § 42-3502.16(c) (2001). Therefore, the burden is with the agency, OAD, to provide substantial evidence of delivery of notice. Joyce v. District of Columbia Rental Hous. Comm'n, 741 A.2d 24 (D.C. 1999); see D.C. OFFICIAL CODE § 2-509(a) (2001). The Commission determined that there is substantial evidence in the record that actual notice of the hearing was delivered. See Diaz v. Perry, TP 24,379 (RHC Dec. 27, 1999).

When the housing provider discussed the issue of notice at the Commission's hearing it cited, Joyce, in support of its argument. The housing provider stated that absent proper notice, the case should be remanded because it (Lenkin) was denied due process. In the instant case, the appellant was sent three hearing notices by priority mail with delivery confirmation. This is distinguished from the appellant in Joyce whose notice was sent by first class mail, which had no confirmation of delivery. With delivery confirmation, there is a receipt indicating that there was delivery. The housing provider conceded at the Commission's hearing that there was actual delivery of the notices. The Act provides that the notice must be mailed by a, "method that assures delivery" and the method used by OAD assured delivery. See § 42-3502.16(c). It should be emphasized that there were three notices sent to the housing provider and all three were confirmed as delivered. This satisfies the statutory method of service.

There is substantial record evidence demonstrating that all three notices of the December 4, 2001 OAD hearing were properly delivered to the housing provider. On October 24, 2001, OAD sent three Official Notices of Hearing (OAD Notice) to Lenkin, by Priority Mail with delivery confirmation. The USPS tracking number for TP 27,191 is 0300 1290 0006 0954 4306 (Record (R.) at 17), for TP 27,192 the tracking number is

0300 1290 0006 0954 4344 (R. at 16) and for TP 27,193 the tracking number is 0300 1290 0006 0954 4399 (R. at 16) and they were delivered to 4922A St. Elmo Avenue Bethesda, MD 20814. This was the address indicated in the housing provider's notice of appeal and was the address used in the tenant petitions. The USPS indicated that these items were delivered at 10:50 a.m. on October 26, 2001. It should be noted that the Commission's review is limited to the evidence contained in the record. Meir v. District of Columbia Rental Accomodation Comm'n, 372 A.2d 566 (D.C. 1977). When the Commission reviewed the record, three receipts for delivery confirmation were present and these receipts are supplemented by an Internet printout from the USPS website verifying the time and date of delivery. This is substantial record evidence showing that these items were mailed by a method which assured delivery. Therefore, there was statutorily adequate service of the OAD Notices upon the housing provider, and the first part of the Radwan test, actual notice of the hearing, is satisfied.

The second factor in Radwan is whether the housing provider acted in good faith. After the proceeding, the housing provider acted in good faith by retaining counsel, filing a motion for reconsideration, filing a notice of appeal, and appearing for the appellate hearing. It is concluded that the housing provider acted in good faith and fulfills this element of the analysis.

The third prong of Radwan is whether the moving party acted promptly. After the OAD hearing, there was a prompt filing of a motion for reconsideration, notice of appeal and appearance for the appellate hearing. Therefore, it can be ascertained that there was prompt action taken on the part of the housing provider and the housing provider meets this element of the test.

The final element of the Radwan test is whether a prima facie adequate defense is presented. The housing provider has the burden of establishing his entitlement to relief in order to vacate a default judgment. This defense must be present in the housing provider's notice of appeal. The Commission is limited to reviewing evidence contained in the record. Meir, 372 A.2d at 566. The Commission found that there was no record evidence of a defense presented. There was no defense mentioned in the notice of appeal, therefore, there was no defense presented. This element of Radwan was not satisfied by the housing provider.

In Radwan the court held that against these factors, prejudice to the nonmoving party must be considered. This is due to the strong judicial policy favoring a trial on the merits; however there is a possibility for prejudice to the nonmoving party when a judgment is vacated. These must be balanced and in this instance, prejudice to the tenants is negligible and is insignificant when applying the Radwan test.

The Commission understands the underlying need for a trial on the merits but must, in reviewing this case, apply the criterion set forth by the Court. The housing provider does not meet the Radwan standard and does not have standing to receive the relief requested under this issue set forth in the notice of appeal.

Accordingly, this issue is denied, and the hearing examiner is affirmed.

B. Whether the Hearing Examiner failed to support the decision to order a rent refund.

C. Whether the Hearing Examiner erred when issuing his decision and order of August 1, 2001 which found the housing provider's rent increases improper and illegal, and whether his decision was plainly wrong and contrary to law.

The housing provider filed an appeal questioning the entry of a default judgment and challenging the merits of the hearing examiner's decision and order. The Commission and the Court have held that a party who fails to appear for an evidentiary hearing does not have standing to appeal the merits of that decision. DeLevay v. District of Columbia Rental Hous. Comm'n, 411 A.2d 354 (D.C. 1980). An exception to this rule is when a party asks to vacate a default judgment because they did not receive proper notice of the hearing. John's Properties v. Hilliard, TPs 22,269 & 21,116 (RHC June 24, 1993). This exception is not applicable in the instant case, because there is substantial record evidence that the housing provider received notice. Since the housing provider did not appear at the OAD hearing, it lacks standing to challenge the results on appeal and the remaining appeal issues are moot.

IV. CONCLUSION

The Commission concludes from its review of the record, that the housing provider received notice, failed to appear, and received a default judgment. When there was adequate notice, but the party does not appear, the right to appeal the merits of a default judgment is lost. Therefore, the housing provider has no standing to appeal the OAD decision regarding rent overcharges and rent refunds. The housing provider's request to vacate the judgment is denied.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

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 D.C. 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 phone 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 TPs 27,191, 27, 192 and 27, 193 was mailed by priority mail with delivery confirmation, postage prepaid, on this **4th day of June, 2004** to:

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