

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

TP 27,369

In re: 5016 2<sup>nd</sup> Street, N.W., Unit 4

Ward Four (4)

DIPLOMAT REALTY  
Housing Provider/Appellant

v.

PHYLLIS J. SMITH  
Tenant/Appellee

**DECISION AND ORDER**

**October 27, 2004**

**BANKS, CHAIRPERSON.** This case is on appeal to the District of Columbia Rental Housing Commission from a decision and order issued by the Rent Administrator. The applicable provisions of the Rental Housing Act of 1985 (Act), 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 December 3, 2001, Phyllis J. Smith, Tenant, filed Tenant Petition (TP), 27,369 in the District of Columbia Department of Consumer and Regulatory Affairs, Housing Regulation Administration (HRA), Rental Accommodations and Conversion Division (RACD). The petition alleged: 1) substantial reduction of services and facilities provided in connection with the Tenant's rental unit, 2) retaliatory action by the Housing

Provider against the Tenant, and 3) an improper notice to vacate which violated the terms of the Act. Administrative Law Judge (ALJ) Lennox J. Simon convened the hearing on June 4, 2002. The Tenant appeared for the hearing, however, the Housing Provider did not appear for the hearing. On September 26, 2002, the ALJ issued the decision and order. It stated that delivery confirmation of the hearing notice to the Housing Provider was made by the United States Postal Service on April 24, 2004. The decision and order contained the following:

Findings of Fact:

1. Petitioner occupied the premises of 5016 2<sup>nd</sup> Street, N.W., Apt. 4, Washington, D.C. from December 19, 1998, until the present time.
2. Petitioner, orally, between August 2001 and December 2001 complained to Respondent about necessary repairs to her unit as a result of a leak in her living room ceiling.
3. Petitioner contacted DCRA, Housing Regulations Administration (HRA) , which resulted in an inspection of Respondent's unit on October 12, 1999. Housing Deficiency Notice #605294 was issued on October 12, 2001.
4. On November 28, 2001, Petitioner received a sixty (60) day notice to vacate her unit effective January 31, 2002, so that repairs can be made to her rental unit.

Diplomat Realty v. Smith, TP 27,369 (OAD Sept. 26, 2002) at 2 & 3.

Conclusions of Law:

1. The 60-day Notice to Vacate issued to Petitioner by Respondent is not in compliance with § 42-3505.01 [sic].
2. Respondent is subject to a fine of up to \$3,500.00 pursuant to D.C. [Official] Code 42-3509.01(b)(4), for Respondent's failure to comply with the statutory requirements of Sec. 42-3505.01 [sic].
3. Respondent retaliated against Petitioner by refusing to make necessary repairs in Petitioner's unit, and by giving Petitioner a 60 day Notice to Vacate her unit in violation of D.C. [Official] Code 42-3505.02 [sic].

4. Respondent knowingly committed an act in violation of chapter 42 of the D.C [Official] Code, Sec. 42-3505.02 [sic].
5. Respondent is subject to a fine of up to \$3,500.00 pursuant to D.C. [Official] Code, Sec. 42-3509.01(b) [sic] for knowingly committing an action in violation [of the] Act namely, retaliating against Petitioner for exercising her right as a tenant.

Decision at 6.

The ALJ granted the petition and ordered the Housing Provider to issue to the Tenant a new 120 day Notice to Vacate, which complied with D.C. OFFICIAL CODE § 42-3505.01 (2001), and imposed a fine of \$7000.00 consisting of \$3500.00 for each violation for “knowingly” violating the Act. Decision at 6.

## II. THE APPEAL ISSUES

The Housing Provider, Diplomat Management, filed the following pro se notice of appeal:

1. Appellee has been and still continues to reside at the premises located at 5016 2<sup>nd</sup> St., N.W. Apt. #4 since December 19<sup>th</sup> 1998.
2. Appellee did, in fact, orally complain between August 2001 and December 2001 about necessary repairs and leaks in the ceiling. Each and every time Merritt Construction & Roofing Company License #4822 was contacted. The repairs were completed at a cost of \$600.00. The problems still persisted and Merritt construction was again sent out to correct the problem. Another Merritt inspection revealed that major roofing repairs were needed and that the repairs would be better performed if the unit were vacant.
3. The owner Dorothy Bent was in fact issued a citation and housing deficiency notice #605294 on October 12<sup>th</sup> 2001. All items were completed, to our knowledge; a re-inspection revealed that the unit was now in compliance. (The owner was personally in charge of the correcting [of] the deficiencies.)
4. Yes, on November 28<sup>th</sup>, 2001, the Appellee was issued a 60-day notice to vacate. This notice to vacate was never exercised

and no attempts were made to have the unit vacated. The Appellee is still currently residing in the unit.

5. Diplomat Management did receive the hearing notice. However, the hearing date was incorrectly recorded by our former assistant property manager to be June 6<sup>th</sup> 2002. In the morning of June 6<sup>th</sup> it was discovered that the hearing date had passed, and the time to request a continuance had also passed.
6. In July 2002, Diplomat Management ceased being the property manager for the apartment building. As of August 2002, Mundark Management (202) 723-6122 was hired as the new property manager.
7. After the Appellee, Phyllis Smith was advised of the management change, she wrote a personal note to Gilda Simons, our property manager, thanking Gilda for the help and assistance afforded to the Appellee during her tenancy period. (She was the only tenant to express their thanks and appreciation.)
8. After discussions with the owner Dorothy Bent no further notices to vacate have been issued to the Appellee.
9. In conclusion, at no time did the owner or Diplomat Management retaliate against the Appellee. The request to vacate stemmed from concerns for the Appellees health, safety and welfare during any major repairs to the roof structure.

### **III. THE COMMISSION'S DISCUSSION AND DECISION**

#### **A. Whether the default judgment was properly entered against the Housing Provider, which raised on appeal the following issues:**

- 1. Whether the Tenant received a proper notice to vacate for repairs and renovation (notice of appeal, ¶ 4 & ¶ 9);**
- 2. Whether the Housing Provider was properly notified of the RACD hearing (notice of appeal ¶ 5);**
- 3. Whether the Housing Provider retaliated against the Tenant (notice of appeal ¶ 9), and**
- 4. Whether the Housing Provider reduced the Tenant's services and facilities (notice of appeal at ¶ 2 & ¶ 3).**

Since the Housing Provider received notice of the hearing<sup>1</sup> and did not appear, the ALJ issued a default judgment and a fine. In Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478, 481 (D.C. 1996) citing Clark v. Mohler, 418 A.2d 1039, 1045 (D.C. 1980) and Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979), the court stated four (4) factors to be considered to set aside a default judgment. They are:

1. whether the movant had notice of the proceeding;
2. whether the movant acted in good faith;
3. whether the movant acted promptly; and
4. whether a prima facie adequate defense was presented.

Earlier, in DeLevay v. District of Columbia Rental Accommodations Comm'n, 411 A.2d 354 (D.C. 1980), the court stated it favored a trial on the merits, but recognized there was an exception for parties who failed to appear. See Alexandra Corp. v. Armstead, TP 24,777 (RHC Aug. 15, 2000) (where the Commission stated the nature of default judgments, which may be appealed on the issue of the correct amount of the judgment, not the liability supporting the judgment).

The Commission's consideration of the record, a review of the notice of appeal, and the Commission's hearing tape revealed the following on the four Radwan factors, stated supra, that: 1) the Housing Provider admitted in the notice of appeal, at ¶ 5, supra p. 4, and at the Commission's hearing that it received notice of the OAD hearing date; 2) the Housing Provider acted in good faith; 3) the Housing Provider promptly appealed the ALJ's decision to the Commission, and 4) the Housing Provider did not present an adequate defense to the ALJ's default judgment in the decision.

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<sup>1</sup> See notice of appeal at ¶ 5, supra, p. 4, where the Housing Provider stated, "Diplomat Management did receive the hearing notice."

On the fourth and last factor, the Housing Provider admitted at the Commission's hearing and a review of the record shows, that it sent to the Tenant two improper notices to vacate. The first notice dated November 28, 2001, stated that the Tenant had to vacate by January 31, 2002, and stated that it was a 60-day notice to vacate. The second notice dated February 13, 2002, stated that the Tenant had to vacate by the end of the month, February 28, 2002, which gave her 16 days notice to vacate, for a combined total of 76 days. The Act, D.C. OFFICIAL CODE § 42-3505.01(f) (2001), requires that the Housing Provider give the Tenant 120 days notice to vacate for renovations. Moreover, the Tenant was entitled to notice of the absolute right to rerent the unit, and she was entitled to relocation assistance, which neither notice stated. Id., See Horne v. Edgewood Mgmt. Corp., TP 24,119 (RHC Mar. 5, 1997). Since the Housing Provider did not give the Tenant a proper 120 day notice to vacate for renovations, it does not have a valid defense to that issue in the default judgment.

Therefore, the analysis of the Radwan factors caused the Commission to affirm the default judgment and decision of the ALJ on the failure of the Housing Provider to present a defense to the issues in the notice of appeal related to the Housing Provider receipt of the notice of appeal, which was admitted; the Housing Provider also admitted its failure to timely repair the Tenant's rental unit as raised by issues 2 and 3 in the notice of appeal; the Housing Provider's failure to serve the Tenant with a proper 120 day notice to vacate for renovations and with notice of the right to rerent the rental unit, as raised by issue 4 in the notice of appeal; and retaliation against the Tenant as raised by issue 9 in the notice of appeal.

**B. Whether the ALJ made a proper analysis and findings of fact on the fine.**

The correct analysis and the correct amount of the fine are the only issues before the Commission on a default judgment properly entered.<sup>2</sup> The ALJ wrote in the OAD decision:

The penalty for retaliatory action is contained in D.C. [Official] Code § Sec. 42-3509.01(b)(3) [sic], which provides, [a]ny person who knowingly... (3) commits any other act in violation of any provision of this chapter ... shall be subject to a civil fine of not more than \$5000.00 for each violation.

“Knowingly” imports only a knowledge of the essential facts bringing petitioner’s conduct ...; and from such knowledge of the essential facts, the law presumes knowledge of the legal consequences arising from performance of the prohibited conduct. In other words, ... actual knowledge of the unlawfulness of the act or omission is not required.

Quality Mgmt. Inc. v. [sic] D.C. [sic] Rental [sic] Housing [sic] Comm. [sic]. Here, there is no question that Respondent was aware of the essential facts, namely that he sent the unlawful November 28, 2001 Notice to Vacate to Respondent and his refusal to make the necessary repairs, [sic]. Therefore, Respondent violation [sic] of Sec. 42-3505.02, was knowingly committed within the meaning of Sec. 42-3509.01, subjecting Respondent to a monetary fine.

Decision at 5 & 6, emphasis added.

The Act provides:

Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, or (2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

D.C. OFFICIAL CODE § 42-3509.01(a) (2001) (emphasis added).

<sup>2</sup> The pro se Notice of Appeal requested “that the [Rent] [A]dministrator’s decision and order be reconsidered.” Notice of appeal at 2. In the absence of a valid defense, the only part of the decision and order that may be reconsidered is the part which relates to the proper imposition of the fine. The Commission also may note “plain error” pursuant to 14 DCMR § 3807.4 (1991).

Any person who willfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than \$5,000 for each violation.

D.C. OFFICIAL CODE § 42-3509.01(b) (2001) (emphasis added.).

The ALJ confused and combined the two sections above, when he wrote in the decision:

knowingly...(3) commits any other act in violation of any provision of this chapter ...shall be subject to a civil fine of not more [] \$5000.00 for each violation.

Decision at 5, and supra.

The ALJ should have used the word “willfully” found in D.C. OFFICIAL CODE § 42-3509.01(b) (2001), not “knowingly” found in D.C. OFFICIAL CODE § 42-3509.01.01(a) (2001) to describe the conduct required for imposing the fine on the Housing Provider. It was error for the ALJ to use the word, “knowingly” when the statute used the word “willfully.” The Commission discussed the law about fines under the Act in RECAP-Gillian v. Powell, TP 27,042 (RHC Dec. 19, 2002), which stated:

In Quality Mgmt v. District of Columbia Rental Hous. Comm’n, 505 A.2d 73, 75-76 (D.C. 1986) the court quoted the legislative history of the penalty section of the Act to explain the distinction between a “knowing” violation of the Act under § 42-3509.01(a) as distinct from § 42-3509.01(b), which requires a housing provider to act “willfully” in violation of the Act. The court stated the distinction, “is further supported by the necessity to draw some independent meaning from the word “willfully,” as used in ... [§ 42-3509.01(b)].” Id. The Council created legislative history during debates on the distinctions, which states:

From the context it is clear that the word ‘willfully’ as it is used in [§ 42-3509.01(b)] demands a more culpable mental

state than the word “knowingly” as used in [§ 42-3509.01(a)]... There is a difference. ‘Willfully’ goes to intent to violate the law. ‘Knowingly’ is simply that you know what you are doing. A different standard. If you know that you are increasing the rent, the fact that you don’t intend to violate the law would be ‘knowingly.’ If you also intended to violate the law, that would be ‘willfully.’ Knowingly [is a] lower ... standard.

Id. at 5.

The ALJ did not make a finding of fact on “willfully” which is the standard in the Act before a fine may be imposed. Accordingly, the ALJ is reversed in conclusion of law numbered five (5), which used the word “knowingly” to describe the Housing Provider’s conduct. See Medley v. Johnson, TP 27,565 (RHC July 23, 2004), citing Schauer v. Asalaam, TP 27,084 (RHC Dec. 31, 2002) where the hearing examiner’s fine was reversed because there were no findings of fact and conclusions of law on “willfully” as required by § 42-3509.01(b).

#### IV. CONCLUSION

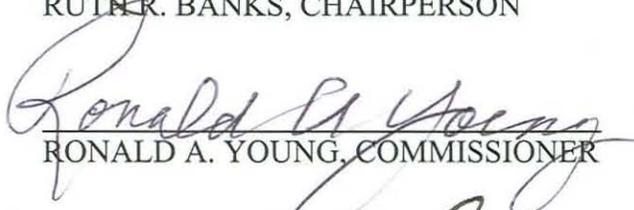
This appeal is affirmed on the findings and conclusions that the Housing Provider received proper notice of the hearing on the Tenant’s petition before the ALJ; that the Housing Provider sent the Tenant improper notices to vacate, that the Housing Provider reduced the Tenant’s services and facilities, and that the Housing Provider retaliated against the Tenant by failing to perform repairs in her rental unit. See appeal issues 2, 4, 5, and 9, which are denied, because the ALJ properly entered the default judgement and the Housing Provider did not proffer a valid defense. Appeal issues 1, 6, 7, and 8 are dismissed as extra record facts which do not state errors related to the decision and order. See Mersha v. Town Center Ltd. P’ship, TP 24,970 (RHC Dec. 21, 2001) (where the Commission dismissed several of the Tenant’s statements that did not raise issues of error

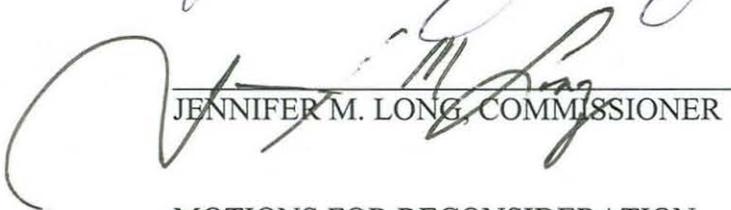
in the decision); Harrison v. Fred A. Smith, TP 25,059 (RHC Mar. 14, 2001) (where the Commission stated that the notice of appeal and two pages of the decision attached to it did not state error in the decision and order). An issue must be raised in the notice of appeal, Remin v. District of Columbia Rental Hous. Comm'n, 471 A.2d 275 (D.C. 1984).

The fine penalty is reversed, because the ALJ did not perform a proper analysis and make findings of fact on whether the Housing Provider acted willfully, as described above. This case is remanded to the Rent Administrator for findings of fact and conclusions of law on whether the Housing Provider acted willfully, and whether a fine shall be imposed. A new hearing is not ordered.

SO ORDERED.

  
RUTH R. BANKS, CHAIRPERSON

  
RONALD A. YOUNG, COMMISSIONER

  
JENNIFER M. LONG, 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 District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

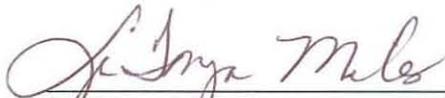
D.C. Court of Appeals  
Office of the Clerk  
500 Indiana Avenue, N.W., 6th Floor  
Washington, D.C. 20001  
(202) 879-2700

### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 27,369 was mailed by priority mail, with confirmation of delivery, postage prepaid this **27th day of October, 2004, to:**

Phyllis J. Smith  
5016 2<sup>nd</sup> Street, N.W.  
Washington, D.C. 20011

Diplomat Realty  
5505 Sargent Road  
Hyattsville, MD 20721



LaTonya Miles  
Contact Representative  
(202) 442-8949