DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,535

In re: 1636 Kenyon Street, N.W., Unit 32

Ward One (1)

JORGE CANALES
Housing Provider/Appellant

v.

EVA MARTINEZ
Tenant/Appellee

DECISION AND ORDER

June 29, 2005

YOUNG, COMMISSIONER. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Housing Regulation Administration (HRA), Rental Accommodations and Conversion Division (RACD), to the Rental Housing Commission (Commission). 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, 14 DCMR §§ 3800-4399 (1991) govern these proceedings.

I. PROCEDURAL HISTORY

On June 18, 2002, Eva L. Martinez, the tenant of unit 32 at the housing accommodation located at 1636 Kenyon Street, N.W., filed Tenant Petition (TP) 27,535 with the Rental Accommodations and Conversion Division (RACD). In her petition, the tenant alleged that property manager, Jorge Canales, the housing provider: 1) charged

her a rent which exceeded the legally calculated rent ceiling for her unit; 2) filed an improper rent ceiling for her unit with RACD; and 3) substantially reduced services and/or facilities provided in connection with the rental of her unit.

An RACD hearing on the petition was held on September 18, 2002, with Hearing Examiner Gerald Roper presiding at the RACD hearing. The hearing examiner issued a decision and order on February 4, 2003. The decision and order omitted the date for filing a Motion for Reconsideration with RACD and/or a Notice of Appeal in the Commission. On April 1, 2003 the hearing examiner issued an amended decision and order which contained a recitation of the parties' appeal rights.

When the examiner convened the evidentiary hearing, the tenant was present; however, the housing provider named in the petition, Jorge Canales, did not appear, personally or through counsel. The tenant presented her case, and because the housing provider failed to appear, the hearing examiner issued a default judgment on the dates referenced above. The decision contained the following findings of fact:

1. The subject property is located at 1636 Kenyon Street, NW [sic] Washington, D.C.

2. Eva L. Martinez has resided in apartment #32 at the subject premises since 1995, and is the Petitioner in this matter. Her rent charged in June 1999 was $685.00 per month.

3. The Certificate of Election of Adjustment of General Applicability dated February 28, 1989 shows the rent ceiling for apartment #32 as $394.00.

4. The 1636 Kenyon Street Associates gave the Petitioner a rent increase notice on December 29, 2000, increasing her rent charged $100.00 from $685.00 per month to $785.00 and her rent ceiling from $891.00 to $910.00 effective February 1, 2001.

5. The 1636 Kenyon Street Associates filed a Certificate of Election of Adjustment of General Applicability dated March 1, 2001, shows

[sic] the rent ceiling for apartment #32 as $910.00.

6. The Kenyon Partners, LLC provided notice of a change of ownership [and] filed an Amended Registration Form on October 16, 2002.

7. Petitioner received a rent increase notice dated May 29, 2002 increasing her rent charged amount $90.00 from $785.00 to $875.00 and her rent ceiling [from] $910.00 to $934.00.

8. There is no rent ceiling on filed [sic] with the RACD for apartment #32 during the period February 28, 1989 through March 1, 2001 (over 10 years).

9. The legal rent ceiling for apartment #32 is $394.00.

10. Tenant Petition Complaint, TP#27,535 was filed June 18, 2002. The rent charged Petitioner in June 1999 was $685.00. The over charge in rent begins in June 1999.

11. There was no evidence presented on the issue of retaliatory action.[1]

Martinez v. Canales, TP 27,535 (RACD Apr. 1, 2003) at 11-12. The hearing examiner concluded as a matter of law:

1. Respondent has a rent ceiling on file with the RACD that is improper and in violation of D.C. [Official] Code X [sic] 42-3502.06 [2001] and 14 DCMR § 4205.1.

2. Respondent has increased the rent charged in excess of the legally calculated rent ceiling in violation of 14 DCMR 4205.1. Therefore, the Petitioner is entitled to a rent roll back and refund pursuant to D.C. [Official] Code X [sic] 42-3509.01.

3. Respondent [sic] has failed to meet her burden of proof in establishing a decrease in the related services.

Id. at 12.

The housing provider filed a renewed Motion for Reconsideration on April 16, 2003. The hearing examiner failed to rule on the motion, and it was denied by operation

[1] The tenant's petition did not contain an allegation of retaliation.

of law pursuant to 14 DCMR § 4013.5 (1991).[2] On May 7, 2003 the housing provider filed a timely Notice of Appeal. The Commission held the appellate hearing on December 11, 2003.

II. ISSUES ON APPEAL

On appeal, the housing provider raised the following issues:

1. The Hearing Examiner erred by proceeding with the hearing without the agency first obtaining service on the proper Housing Provider in this action. The named Respondent, Jorge Canalas,[3] is not a Housing Provider as defined by the Code.

2. The Hearing Examiner erred by finding that the Respondent was a Housing Provider.

3. The Hearing Examiner abused his discretion by failing to grant the Motion for Reconsideration.

4. The Hearing Examiner erred by determining that the rent ceiling for the subject accommodation is only $394.00 per month.

5. The Hearing Examiner erred by acknowledging a change in ownership of the subject accommodation, but nevertheless made an award against the Respondent for a time period prior to ownership.

8.[4] The Hearing Examiner erred in its [sic] calculation of alleged rent overcharged.

9. The Hearing Examiner erred by imposing a fine of $5,000.00.

10. The Hearing Examiner erred by calculating the claim beyond the statute of limitations.

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[2] The applicable regulation, 14 DCMR § 4013.5 (1991), provides:

> Failure of a hearing examiner to act on a motion for reconsideration within the time limit prescribed by §4013.2 shall constitute a denial of the motion for reconsideration.

[3] In the Notice of Appeal, counsel spells the housing provider's name Canalas. The caption in the Rent Administrator's decision spells the housing provider's name as Canales.

[4] The error in the numbering of the issues appears in the Notice of Appeal, the notice omitted issues numbered six (6) and seven (7).

Notice of Appeal at 2.

III. PROCEDURAL ISSUE ON APPEAL

Whether a party against whom a default judgment was entered in the Rent Administrator's decision and order has standing to appeal the merits of the decision to the Commission.

It is a well-established principle that a party who fails to appear at a hearing before the Rent Administrator lacks standing to appeal from decisions that were rendered at that hearing. See Alexandra Corp. v. Armstead, TP 24,777 (RHC Aug. 15, 2000); John's Properties v. Hilliard, TP 22,269 and TP 21,116 (RHC June 24, 1993) (citing Delevay v. District of Columbia Rental Accommodations Comm'n, 411 A.2d 354 (D.C. 1980)). When a party who has not participated in the hearing below appeals the merits of the decision, the Commission is compelled to dismiss the appeal of the merits, because the party lacks standing. See Sydnor v. Johnson, TP 26,123 (RHC Nov. 1, 2002); Jenkins v. Cato, TP 24,487 (RHC Feb. 15, 2000).

An exception to this rule occurs when a party alleges that he or she did not receive notice of the hearing. See Sydnor, supra; Wofford v. Willoughby Real Estate, HP 10,687 (RHC Apr. 1, 1987). The exception is based on the strong policy favoring trials on the merits. See Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478, 481 (D.C. 1996).

The District of Columbia Court of Appeals (DCCA) has identified the following four factors that the Commission must consider in order to determine whether to set aside a default judgment: (1) whether the movant received actual notice of the proceeding; (2) whether the movant acted in good faith; (3) whether the movant acted promptly; and (4) whether the movant presented a prima facie adequate defense. See Radwan, 683 A.2d at 481 (citing Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979)).

Accordingly, the Commission first must determine whether the housing provider met the factors enunciated in Radwan, supra. As stated earlier, the initial factor in the test under Radwan, is whether the party seeking to have the default judgment set aside received actual notice of the hearing. There is a presumption of receipt of an item if the agency has properly mailed it. Foster v. District of Columbia, 497 A.2d 100, 102 n.10 (D.C. 1985); Allied American Mut. Fire Ins. Co. v. Paijze, 143 A.2d 508, 510 (D.C. 1958).

In the instant case, the housing provider does not argue that the person named in the petition, Jorge Canales, did not receive an Official Notice of Hearing from HRA. The RACD record reflects that Jorge Canales received notice of the Rent Administrator's hearing by priority mail with confirmation of delivery on August 16, 2002.[5] Record (R.) at 17. Rather, counsel for the housing provider argues in the Notice of Appeal that the Rent Administrator held the evidentiary hearing without first obtaining service on the proper housing provider. Counsel asserted that the housing provider named in the tenant petition, Jorge Canales, was not a housing provider as defined by the Act. Unfortunately, the housing provider failed to file a brief in support of the appeal which elaborated on the contention that Mr. Canales was not a housing provider.[6]

At the Commission's appellate hearing, counsel for the housing provider essentially argued that Mr. Canales was employed as the resident manager of the former

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[5] The record reflects that RACD accessed the United States Postal Service (USPS) Internet website that confirmed delivery of the hearing notice to Jorge Canales at 3145 Mount Pleasant Street, N.W., Apartment number 303, Washington, D.C., 20010 on August 16, 2002.

[6] The applicable regulation , 14 DCMR § 3802.7 (1991) states:

> Parties may file briefs in support of their position within five (5) days of receipt of Notification that the record in the matter has been certified.

owner of the housing accommodation. The tenant contradicted this statement, at the Commission hearing, by arguing that Mr. Canales received rent checks (and issued receipts for rental payments), an activity which would qualify Mr. Canales as a housing provider under the Act.[7] In either case, the contentions made by counsel and the tenants at the Commission's hearing are not apart of the substantial record evidence upon which the Commission may make its decision.

On appeal to the Commission, the housing provider had the burden of proof to show entitlement to relief from the default judgment, by showing that he met the four factors of the test set out in the Radwan decision. See Radwan, supra at 481. While the record reflects that the housing provider met three of the four factors in the Radwan test, that is, he acted promptly upon receipt of the RACD default decision; he had a reasonably meritorious defense; and he acted in good faith, nevertheless, the housing provider failed to meet his burden to show that he did not receive actual notice of the hearing. The record reflects that the housing provider received notice of the September 18, 2002 hearing on August 16, 2002. See R. at 17; n.5 supra. Accordingly, the decision of the hearing examiner is affirmed, and the appeal of issues one (1) through five (5) and nine (9) are dismissed.

Despite the fact that the housing provider's appeal regarding the merits of the Rent Administrator's decision must be dismissed pursuant to the court's decision in Radwan, supra, in Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 855 (8th Cir. 1996), cited in Alexandra Corp. v. Armstead, TP 24,777 (RHC Aug. 15, 2000), the

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[7] The Act, D.C. OFFICIAL CODE § 42-3501.03(15) (2001), provides:

> 'Housing provider' means a landlord, an owner, lessor, sublessor, assignee, or their agent, or any other person receiving or entitled to receive rents or benefits for the use or occupancy of any rental unit within a housing accommodation within the District. (emphasis added).

court held that a judgment by default was within the constructs of Rule 55(b) of the Federal Rules of Civil Procedure, a rule which is identical to the Superior Court of the District of Columbia Civil Rule 55(b) [hereinafter Super. Ct. Civ. R. 55(b)], and was therefore considered a final judgment, which could be immediately appealed. Therefore, while the housing provider lacks standing to appeal the merits of the Rent Administrator's decision, the rent refund judgment rendered in the hearing examiner's default decision is a final judgment, which, may be appealed. The Commission's application of Super. Ct. Civ. R. 55(b) is permissible pursuant to the Commission's regulations at 14 DCMR § 3828.1 (1991).[8]

Super. Ct. Civ. R. 55(b)(1) describes a judgment by default entered by the clerk and provides: "[W]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the plaintiff shall have filed a complaint verified by the plaintiff or by the plaintiff's agent . . . the Clerk . . . shall enter judgment for that amount and costs against the defendant." (emphasis added.)

> In all other cases the party entitled to a judgment by default shall apply by motion to the Court therefore . . . If, in order to enable the Court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the Court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any applicable statute.

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[8] The Commission's rule, 14 DCMR § 3828.1 (1998) states:

> When these rules are silent on a procedural issue before the Commission, that issue shall be decided by using as guidance the current rules of civil procedure published and followed by the Superior Court of the District of Columbia and the rules of the District of Columbia Court of Appeals.

45 D.C. Reg. 687 (1998).

Super. Ct. Civ. R. 55(b)(2). A default judgment "is a final judgment that terminates the litigation and decides the dispute." Lockhart v. Cade, 728 A.2d 65, 68 (D.C. 1999), cited in Alexandra Corp., supra. The distinction between the entry of default and judgment by default, for our purposes, is that "the entry of a default does not constitute a judgment, but simply precludes the defaulting party from offering any further defense on the issue of liability." Id. (citing Clark v. Moler, 418 A.2d 1039, 1042 (D.C. 1980)). Final judgments, such as judgments entered pursuant to 55(b)(1) are appealable immediately, whereas the mere entry of a default pursuant to 55(a), is not a "judgment" and therefore is not immediately appealable.

In Alexandra Corp., supra, the Commissions stated:

> In Alexandra Corp. v. Armstead, TP 24,777 (OAD Apr. 10, 2000) a final judgment, which closely resembles a 55(b)(1) judgment by default, was entered in the plaintiff's favor by the Rent Administrator. Therefore, the appellant, Alexandra Corporation, was permitted to appeal the judgment based on an alleged error related to damages, despite the default judgment entered against it by the Rent Administrator. The appellant has standing to appeal, because the judgment entered against Alexandra Corporation by the Rent Administrator closely resembled R. 55(b)(1) and not R. 55(a). The circumstances of this case closely resemble a judgment by default entered by the clerk, based on Alexandra Corporation's failure to attend the hearing, a judgment by default was entered by the Rent Administrator, a full hearing was held, absent the housing provider, and the plaintiff's claim in the court below was for a "sum which can by computation be made certain." Super. Ct. Civ. R. 55(b)(1). The judgment by default was a valid and final personal judgment and it was rendered in favor of the plaintiff. Therefore, the plaintiff's claim became extinguished and merged in the judgment and a new claim could arise on the judgment. Based on the law, the appellant, Alexandra Corporation, has standing to appeal the amount of the default judgment, but does not have standing to appeal liability based on its default.

Id. at 8-9. Accordingly, the Commission will address the issues raised by the housing provider concerning the damages assessed by the RACD decision and order.

IV. DISCUSSION OF THE ISSUES

A. Whether the hearing examiner erred in his calculation of the rent overcharge.

The Commission's regulation concerning the initiation of appeals, 14 DCMR 3802.5(b) (1991), provides that the notice of appeal shall contain the following: "The Rental Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from, and a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator." (emphasis added).

On appeal to the Commission the housing provider argues that the hearing examiner "erred in his calculation of the rent overcharge." However, the housing provider failed to provide the Commission with the specific nature of the error to which he refers. The Commission previously held that an appeal, which fails to provide the Commission with a clear and concise statement of the alleged errors in the decision as required by 14 DCMR 3802.5(b) (1991), will be dismissed. Kenilworth Parkside RMC v. Johnson, TP 27,782 (RHC June 22, 2005); Vicente v. Anderson, TP 27,201 (RHC Aug. 20, 2004). Accordingly, the Commission dismisses this appeal issue as violative of the Commission's rules on appeals.

B. Whether the hearing examiner erred by calculating the claim beyond the statute of limitations.

The Act, D.C. OFFICIAL CODE § 42-3502.06(e) (2001), prescribes a three-year statute of limitations, which provides:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as

> provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

The "statute of limitations embodied in D.C. OFFICIAL CODE § 42-3502.06(e) (2001), bars any investigation of the validity of rent levels, or of adjustments in either rent levels or rent ceilings, implemented more than three (3) years prior to the date of the filing of the tenant petition." Vicente, supra; 424 Q St. Ltd. P'ship/Chamberlain v. Evans, TP 24,597 (RHC July 31, 2000); citing South Dakota Ave. Tenants' Ass'n v. Cowan, TP 23,085 (RHC Sept. 14, 1998), see also Kennedy v. District of Columbia Rental Hous. Comm'n, 709 A.2d 94 (D.C. 1998).

In the instant case, the tenant petition was filed on June 18, 2002. Pursuant to § 42-3502.06(e) of the Act and the court's decision in Kennedy, supra, the hearing examiner was barred from investigating adjustments in either rent levels or rent ceilings, implemented more than three (3) years prior to June, 2002. Therefore, June 1999 was the beginning of the period for filing for damages due to improper rent adjustments under the Act. The RACD hearing was held on September 18, 2002. The Commission has previously held:

> [T]he Commission … 'looks forward' from the date the petition was filed, to the termination date of the violation. If the violation did not terminate prior to the timely filing of the petition, and if the record contained evidence of the continuing violation, the remedy of refund for improper rent adjustment may go up to the date the record closed which is usually the hearing date. Interest on the refund is awarded through the date the agency decision issued.

Jenkins v. Johnson, TP 23,410 (RHC Jan. 4, 1995).

A review of the decision reflects that the hearing examiner's computation of the rent refund awarded the tenant spanned the period from June 1999 through December 2002. Martinez v. Canales, TP 27,535 (RACD Apr. 1, 2003) at 8-10. Therefore, the

hearing examiner erred when he awarded a refund to the tenant for the period from October 2002 through December 2002, after the record in the case closed after the hearing on September 18, 2002. Accordingly, the housing provider's appeal of this issue is granted and the decision of the hearing examiner awarding the tenant a refund for the period from October 2002 through December 2002 is reversed and the case is remanded for a recalculation of the refund excluding the months October 2002 through December 2002.

IV. CONCLUSION

For the foregoing reasons, the decision of the hearing examiner is affirmed in part, and the housing provider's appeal issues one (1) through five (5) and nine (9) are DISMISSED. The housing provider's appeal issue eight (8) is also DISMISSED for the failure to provide a clear and concise statement of the alleged errors in the decision of the Rent Administrator as required by 14 DCMR 3802.5(b) (1991). The housing provider's appeal issue ten (10) is GRANTED, and the decision of the hearing examiner is REVERSED and REMANDED to the hearing examiner for a recalculation of the refund awarded the tenant excluding the months October 2002 through December 2002, and the interest thereon. No additional hearings are required.

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 27,535 was mailed postage prepaid by priority mail, with delivery confirmation on this **29th** day **of June, 2005** to:

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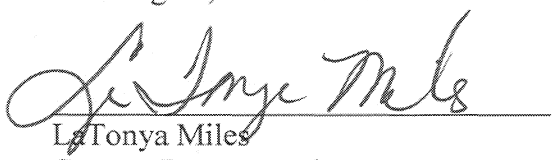

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