DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,678

In re: 3549 11th Street, N.W., Unit 1

Ward One (1)

BILLY T. NORWOOD
Tenant/Appellant

v.

MARK S. PETERS
Housing Provider/Appellee

DECISION AND ORDER

February 3, 2005

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, in the Rental Accommodations and Conversion Division (RACD), Department of Consumer and Regulatory Affairs (DCRA). 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

Billy T. Norwood, Tenant, filed Tenant Petition (TP) 27,678 on November 8, 2002. The petition alleged: 1) a rent increase larger than allowed by the Act; 2) less than 180 days passed between the rent increases; 3) lack of proper 30 day notice of rent increase before it was effective; 4) the Housing Provider failed to file the proper rent

increase forms with RACD; 5) the rent charged exceeded the rent ceiling; 6) the rent ceiling filed with RACD was improper; 7) the rental unit was not in compliance with the Housing Code when the rent increase was effective; 8) services and facilities set forth in a Voluntary Agreement have not been provided as specified; and 9) retaliation. On February 4, 2003, Hearing Examiner Carl Bradford held the hearing on the tenant petition and on April 4, 2003, he issued the decision and order.

The decision and order contained the following:

Findings of Fact:

1. The subject housing accommodation 3549 11 Street, N.W. is owned by Mark S. Peters.

2. Petitioner Billy T. Norwood resides at 3549 11 Street, N.W. Washington, D.C.

3. Petitioner's rent has been $850.00 since December 1, 2000.

4. Petitioner's rent has not been increased since Petitioner moved into the building.

5. The Respondent filed his claim of exemption form on October 14, 1998.

6. The subject housing accommodation located at 3549 11th Street, N.W. is exempt from rent control based on the December 1, 1998 filing.

7. Petitioner did not present any evidence to rebut the claim of exemption filed December 1, 1998.

8. Respondent did not retaliate against Petitioner.

Conclusions of Law:

1. Petitioner has failed to prove by a preponderance of the evidence that Respondent was not registered or exempt in violation of D.C. Official Code § 42-3502.05(g) (2001).

2. Respondent did not retaliate against Petitioner in violation of D.C. Official Code § 42-3502.02 [sic] (2001).

3. All other issues are dismissed.

Norwood v. Peters, TP 27,678 (RACD Apr. 4, 2003) (Decision) at 6.

On April 17, 2003, the Tenant filed a notice of appeal in the Commission, which held its appellate hearing on October 9, 2003.

II. THE ISSUES

The notice of appeal stated the following issues:

A. Examiner found Housing Provider's property exempt under law without legally admitted evidence. (Tenant did not submit Exhibit #1 into evidence and landlord was not present or represented at the hearing to submit evidence.)

B. Hearing Examiner applied the law incorrectly, as it relates to retaliatory action against tenant. (Landlord was not present to rebut any presumption or retaliation).

C. The findings of fact are not supported or logically related to the evidence in [the] record.

D. The conclusions of law in regards to D.C. [Official] Code, Section 42-3502.05(g) (2001) and Section 42-3502.02 (2001) are completely misapplied in this case.

E. The Landlord/respondent refused to attend hearing nor was he represented by an attorney. The landlord should have been ruled in default.

III. THE DISCUSSION OF THE ISSUES

A. Examiner found Housing Provider's property exempt under law without legally admitted evidence. (Tenant did not submit Exhibit #1 into evidence and landlord was not present or represented at the Hearing to submit evidence.)

The hearing examiner wrote in the decision:

> The examiner takes official notice of the Registration files maintained at RACD in the normal course of business, and they indicate that there is a current Registration/Claim of Exemption statement on file for the subject property.... Here Petitioner did not provide any evidence to rebut the evidence in the RACD file on the subject property 3549 11th Street, N.W. Accordingly, the Examiner rules that Respondent did not fail to properly register subject property with RACD. Further, the Examiner concludes

> that Petitioner's claim regarding the Respondent's failure to register the property is without merit. Thus, the examiner finds that the subject property is exempt from the purview of Title II of the Act, and the Examiner has no jurisdiction to adjudicate any of the rents or rent ceiling adjustment issues raised in this case. However, the Examiner determines he does have jurisdiction to adjudicate only one issue and that is the issue of retaliation.

Decision at 4 (emphasis added).

Pursuant to the District of Columbia Administrative Procedure Act, DCAPA, D.C. OFFICIAL CODE § 2-509 (2001); 14 DCMR § 4009.7 (1991), the hearing examiner is authorized to take official notice of agency records. The Registration/Claim of Exemption Form is an agency record of the Housing Provider's properties. In this appeal the Tenant also gave the hearing examiner a copy of the Housing Provider's registration form. Decision at 3. "The Examiner reviewed the document and determined that it was filed October 14, 1998 by the owner of the property 3549 11th Street, N.W. Washington, D.C. Mark S. Peters under exemption number 39807887." Id. However, Peters was not present at the hearing for cross-examination on the form by the Tenant.

The Act provides for exemption based on ownership of four or fewer units, D. C. OFFICIAL CODE § 42-3502.05(a)(3). The burden of proof is on the Housing Provider to prove eligibility for an exemption from the Act. Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007 (D.C. 1987); Best v. Gayle, TP 23,043 (RHC Nov. 21, 1996) at 5. The Commission stated in The Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) at 12-13:

> In each instance of a claimed exemption, the housing provider has the burden of proof. Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990); citing Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007, 1017 (D.C. 1987) (other citations omitted.) The filing of a claim of exemption form does not ipso facto meet the burden of proof on exemption, because the facts stated

> therein must be proven not to be a misrepresentation. Revithes at 1011-12.... We conclude, some evidence of the exemption must be presented at the OAD hearing, not merely an assertion, or oral statement, or the Registration/Claim of Exemption Form, for the Commission to review to determine the record contains substantial evidence to support the claim of exemption. (citation omitted.)

The Tenant does not have to prove Housing Provider is not exempt. See Milligan v. Novak, TP 23,176 (RHC Sept. 6, 1996) at 4. The claim of exemption is an affirmative defense that must be proved by the housing provider. Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990).

Since Peters, the Housing Provider, was not present at the hearing, he did not give testimony in support of his burden of proof on the Registration/Claim of Exemption Form. Accordingly, Peters did not carry his burden of proof, and there was nothing for the Tenant to rebut. Therefore, the hearing examiner is reversed on finding of fact numbered 7, that the Tenant did not present any evidence to rebut the claim of exemption, which consisted of only the registration form for exemption, without testimony from the Housing Provider to carry his burden of proof.

B. Hearing Examiner applied the law incorrectly, as it relates to retaliatory action against tenant. (Landlord was not present to rebut any presumption of retaliation).

The hearing examiner wrote in the decision:

> The Petitioner asserted that the Respondent has engaged in retaliatory action against him, because Respondent harassed him with a notice to move his second car a vintage car from the parking lot since each tenant could only park one car on the lot.
>
> Respondent did not appear to testify.
>
> ...
>
> To prove his case, Petitioner must demonstrate first that Respondent committed the alleged retaliatory act. Next, Petitioner must demonstrate

that he engaged in one of the actions protected by D.C. Official Code § 42-3505.02 (2001), hence giving rise to the presumption of retaliatory action, or that Respondent was in fact retaliating against Petitioner, for the exercising of some right.

Billy T. Norwood testified that he was served with a notice to move his car out of the parking lot. The Respondent told him to get rid of the second car if he does not pay the increase in rent demanded.

Based on the testimony the Examiner determines that the Respondent [absent from the hearing and not represented at the hearing] has overcome the presumption that he retaliated against the Petitioners. The notice to remove the second car from the parking lot appears to be valid on its face. It is for these reasons the Examiner dismisses the issue of retaliation.

Decision at 4-5.

The law on retaliation is:

(a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

(b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:

(1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;

(2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is

> located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
>
> (3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;
>
> (4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
>
> (5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or
>
> (6) Brought legal action against the housing provider.

D.C. OFFICIAL CODE § 42-3505.02 (2001) (emphasis added). The determination of retaliation is a two step process, which is explained in two sections of the Act at § 42-3505.02(a)&(b). Based on the Tenant's testimony, as written in the decision, plus a note dated November 6, 2002 from the Housing Provider to the Tenant about removing the Tenant's second car from the parking lot, the Housing Provider committed an act that could be retaliation, if the Tenant proved within six months before the note that the Tenant performed a listed action in the Act. The note states, "You only have one parking space. Your car shall be towed at your own expense .... This is your final notice." Record (R.) 1. Several clauses of § 42-3505.02(a) of the retaliation section of the Act apply to the Housing Provider's action of giving the Tenant written notice, which demanded that the Tenant remove his second car from the parking lot. Those clauses are: 1) action which would unlawfully increase rent, 2) decrease services, 3) constitute undue or unavoidable inconvenience, 4) harass, or 5) reduce the quality or quantity of service. After establishing the Housing Provider's conduct, the hearing examiner must determine whether the Tenant raised the presumption of retaliation, which is not raised by the Housing Provider's actions under § 42-3505.02(a) but is raised by the Tenant's actions under § 42-3505.02(b). The Tenant testified that he took one of the six actions under

Section (b) of the Act. That action was to complain about repairs within six months *before* the Housing Provider sent him the note demanding that the Tenant remove his second car from the parking lot. The Act states that within six (6) months, if the Tenant, "(3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;" that the presumption of retaliation arises. Id. Here, the Tenant wrote a letter dated November 1, 2002, which stated, in relevant part:

> When I moved in I complained of several problems that existed, but you made no effort to correct them and they still exist. For this reason, I am taking my complaint to the Rental Housing Commission. I have already complained about the water being turned off on several occasions. The numerous other problems have been expressed in my letters to you when I make my payments each month.
>
> I will hold the additional $150.00 you have requested until a decision is made by the Rental Housing Commission.

Letter dated November 1, 2002, R. 2.

In DeSzunyogh v. William C. Smith & Co., Inc., 604 A.2d 1 (D.C. 1992), the tenant entered into a lease agreement that required her to provide keys to the Housing Provider. The Tenant complained about repairs in the rental unit and the rent increase. The Housing Provider filed for possession of the premises on the grounds that the tenant did not provide duplicate keys. The court held that the content and timing of the tenant's letters to the landlord for repairs were sufficient to raise the presumption of retaliation.

In this appeal the Housing Provider's note to the Tenant about removal of his second car is dated November 6, 2002, which is six days, within six months, after the Tenant withheld a portion of his rent, and gave written notice dated November 1, 2002 of a housing code violation (water turned off) to the Housing Provider. Therefore, the Commission considers the timing of the Housing Provider's note to the Tenant. The

record shows that the Tenant raised the presumption of retaliation, by showing the Housing Provider reacted to his November 1, 2002 letter about the water cut off and the rent increase within six days of the Tenant's letter. Further, the Housing Provider was not present at the hearing to rebut the presumption raised by the Tenant. See Youssef v. United Mgmt. Co., Inc., 683 A.2d 152, 155 (D.C. 1996) (Must show non retaliatory nature of Housing Provider's actions by clear and convincing evidence).

The hearing examiner's analysis on retaliation was flawed, because he did not consider the Tenant's November 1, 2002 letter to the Housing Provider. The examiner only considered the Housing Provider's notice dated November 6, 2002 to the Tenant about removal of the second car as "appears to be valid on its face." Decision at 5.

The hearing examiner's dismissal of the Tenant's retaliation claim is reversed. This appeal is remanded to the hearing examiner to consider all of the tenant petition issues, which he dismissed and comply with the law on retaliation and small housing provider, as explained in this decision.

C. The findings of fact are not supported or logically related to the evidence in [the] record.

D. The conclusions of law in regards to D.C. [Official] Code, Section 42-3502.05(g) (2001) and Section 42-3502.02 (2001) are completely misapplied in this case.

The Commission's appeal rules require a statement of the errors in the decision and order, 14 DCMR § 3802.5 (1991); cited in Hay v. Merkle, TP 27,937 (RHC May 25, 2004); 5112 MacArthur, L. P. v. Tenants of 5112 MacArthur Boulevard, CI 20,791 (RHC Feb. 27, 2004); McKinney v. King, TP 27,264 (RHC July 24, 2002); Tenants of 2480 16th St., N.W. v. Dorchester Hous. Ass'n, CI 20,739 & CI 20,741 (RHC Jan. 14, 2000);

The issues numbered C-D above, are not stated in a manner which explains or identifies what is the evidence in the record that does not support the findings of fact, and why the conclusions of law are misapplied. Accordingly, those issues are dismissed.

E. The Landlord/respondent refused to attend hearing nor was he represented by an attorney. The landlord should have been ruled in default.

In Spingarn v. Landow & Co., 342 A.2d 41 (D.C. 1975); Smith v. Worksman, 99 A.2d 712, 713(D.C. 1953) the court stated, "if, pending an appeal, an event occurs which renders it impossible for the appellate court to grant any relief, or makes a decision unnecessary, the question becomes moot and the appeal will be dismissed." Cited in Thompson v. Ziska, TP 27,789 (RHC Sept. 26, 2003). Based on the Commission's decision on issues A-D, this issue is moot, because no more relief can be given to the Tenant.

IV. CONCLUSION

The Commission reversed the hearing examiner's determination that the property was exempt based on the small housing provider exemption in the Act, D.C. OFFICIAL CODE § 42-3502.05(a)(3) (2001). The Commission also reversed the hearing examiner's determination that there was no retaliation, pursuant to D.C. OFFICIAL CODE § 42-3505.02

(2001). Accordingly, this appeal is remanded to the Rent Administrator for consideration of all the issues that were dismissed.

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'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 27,678 was mailed by priority mail, with confirmation of delivery, postage prepaid this 3rd **day of February, 2005**, to:

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