DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 3788

In re: 2480 16th Street, N.W.

Ward One (1)

HAGNER MANAGEMENT CORPORATION
Housing Provider/Appellant

v.

BENOIT BROOKENS, et al.
Tenants/Appellees

ORDER ON MOTION FOR RECONSIDERATION

May 14, 1999

BANKS, CHAIRPERSON. On February 4, 1999, the Commission issued its third decision and order in this case.[1] On February 24, 1999, the tenants' representative, Benoit Brookens, filed a motion for attorney's fees. On March 16, 1999, the Commission denied the tenants' motion for attorney's fees. The denial was based on the appeal court's decision in Brookens v. Committee On Unauthorized Practice of Law, 538 A.2d 1120, 1126-1127 (D.C. 1988), which specifically prohibited Brookens from practicing law in the District of

[1] The procedural history in the Commission's decision gives the background information about this case. Hagner v. Brookens, TP 3788 (RHC Feb. 4, 1999).

Columbia.[2] Consequently, the Commission decided that Brookens was not qualified or eligible for an award of attorney's fees. However, under the Commission's rules he was allowed to represent tenants before the agency as a lay representative, especially since he was a tenant at the time the petition was filed and now a former tenant of the housing accommodation. 14 DCMR 3812.1(d). Thereafter, Brookens requested reconsideration of the Commission's order denying him attorney's fees. The motion for reconsideration is denied for the following reasons.

I. Brookens' Positions

Brookens argued the following on reconsideration. First, that on January 4, 1980, two attorneys, Ronald Isaac and he, entered their appearances in this case. Brookens is a member of both the Wisconsin and Pennsylvania bars, and no challenge was made to Attorney Isaac. Brookens also noted the agency rules allowed out of town attorneys to practice before the agency. 14 DCMR 3812.4(b),[3] 4004.1(d).

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[2] The court in Brookens stated that Brookens was prohibited from "(1) representing any person other than himself, or any corporation, association, partnership, organization, or other entity,..." Brookens, n.6.

[3] 14 DCMR 3812.4 states, "[a] person may be represented in any proceeding before the Commission by one (1) of the following: ... (b) [a]n attorney admitted to practice before the highest court of any state upon the granting by the Commission of a motion for special appearance." This rule was never invoked by Brookens, the Commission never ruled he could make a special appearance, and therefore, he cannot rely on this regulation. More importantly, the decision by the appeals court in Brookens prohibits

The Commission relies upon the appeals court decision in Brookens v. Committee on Unauthorized Practice of Law, 538 A.2d 1120, 1126-27 (D.C. 1988), which ordered Brookens not to hold himself out as an attorney and prohibited his practice of law in the District of Columbia. Therefore, he cannot be awarded attorney's fees as an attorney.

Second, Brookens, a tenant and party affected by this case, argued he qualified for attorney fees as a tenant and attorney proceeding "pro se," who represented himself.[4] However, the law is pro se attorneys cannot be awarded attorney's fees.[5] The Commission has previously determined not to allow pro se attorney fees. See Mellon Property Management Co. v. Obebe, TP 23,453 (Jan. 12, 1995).

Third, Brookens relies on the attorney status of Attorney Isaac to support his argument that attorney fees should be allowed. The housing provider noted in its opposition that Attorney Isaac did not appear in any of the remand proceedings

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Brookens from practicing law using "special appearance rules." Brookens at 1123-25.

[4] In one instance a pro se attorney received attorney fees from the Commission and the appeals court. Alexander v. District of Columbia Rental Housing Commission, 542 A.2d 359 (D.C. 1988). However, that case was reheard by the Court, which clearly indicated it would not have allowed the pro se attorney fees, if Kay v. Ehrler, n.5, had earlier been decided. See Lenkin Company Management v. District of Columbia Rental Housing Commission, 677 A.2d 46 (1996).

[5] Attorney fees are not allowable to pro se attorneys. Kay v. Ehrler, 499 U.S. 432, (1991), McReady v. Department of Consumer & Regulatory Affairs, 618 A.2d 609 (D.C. 1992).

in this case. Upon review of the record, the Commission agrees that Attorney Isaac never made an appearance in the OAD remand hearings, which were the basis of the Commission's February 4, 1999 decision. In addition, Attorney Isaac has not in the last nine years appeared before the Commission in this case. Finally, Attorney Isaac has not applied for attorney's fees under the Act. Therefore, Brookens cannot support his claim for attorney's fees by reliance on Attorney Isaac.

Fourth, Brookens stated that he entered his appearance pursuant to the regulations in effect for the Rental Housing Act of 1977, D.C. Law 2-54. However, the Commission responds that the Rental Housing Act of 1977, did not have an attorney fee provision, as does the 1985 Act. Therefore, he proceeded under the 1985 Act, D.C. Code § 45-2592, when he requested attorney's fees.

The rule is that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees. Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). The 1977 Act did not provide for attorney's fees; however, that Act was superseded by the 1985 Act, which does provide for attorney's fees. Brookens does not qualify for attorney's fees for the reasons stated herein.

When the Commission issued its decision and order on February 4, 1999 and the order on the tenants' motion for attorney's fees on March 16, 1999, it quoted the supersedure section of the 1985 Act, D.C. Code § 45-2593, which stated the 1985 Act superseded the previous Acts of 1975 and 1977. However, the supersedure section of the 1985 Act stated that a petition filed under the 1980 Act shall be decided under the terms of the 1980 Act, which was effective on March 4, 1981. Both the 1980 Act, D.C. Code § 45-1592 (1981 Ed.) and 1985 Act, D.C. Code § 45-2592 (1996), have the identical text that provide for attorney's fees. The tenant petition in this case was filed September 20, 1979, under the 1977 Act, which according to the supersedure clause of the 1985 Act has been superseded by the 1985 Act. Both the housing provider and the tenants cited cases for reconsideration on the issue of what statute controls when the law changes during litigation. However, none of those cases addressed the issue of a supersedure clause that clearly stated one Act was superseded by another Act, as the 1985 Act states it supersedes the 1977 Act. Therefore, the Commission holds that the 1985 Act applies to this case. The appeals court has admonished the Commission that it cannot change the terms of a statute to make it more fair or equitable. J. Parreco & Son v. Rental Housing Commission, 567 A.2d 43, 49-50 (D.C. 1989).

Fifth, Brookens asserted that the Commission misread his appearances as documented in the record. Brookens stated that on July 27, 1986, he and Attorney Ronald Isaac entered their appearances as attorneys in this case. He noted that the Commission's regulations in 1980 had only one type of representation for "any consenting person of the party's choice." (Motion for Reconsideration (motion) at 3.) He asserted there was no distinction between lay and attorney representatives.

The Commission holds that the prohibition against Brookens practicing law in the District of Columbia from the Brookens case, approximately two (2) years after his appearance in this case, is the law that must be applied to his appearance as an attorney in this case. Therefore, Brookens cannot now rely on his earlier appearances as an attorney in this case to collect attorney's fees. Moreover, as a lay representative, he cannot collect attorney fees, because attorney fees are payable only to qualified attorneys.

Sixth, Brookens stated his appearance in this case was based on contracts with the tenants. He asserted that the housing provider's attorneys had copies of those representation contracts and made settlements with some of the represented tenants. That allegation would normally cause the

Commission concern.[6] However, according to the housing provider's attorney, the allegation of settlements with the represented tenants was the subject of an investigation by Bar Counsel which dismissed the charges. That dismissal precludes further consideration of those issues.

Moreover, since the Commission has determined that Brookens is not a qualified practicing attorney in the District of Columbia, the ethical concern related to an attorney having unauthorized contacts with represented clients (the tenants) does not arise in this case, because Brookens qualifies only as a lay representative not as an attorney representative. Any contacts the housing provider's attorney had with the tenants would not be forbidden, since their representative was not an attorney.

Seventh, Brookens asserted that attorney's fees are mandatory and cannot be waived. Moreover, he asserted that the Commission should not change its twenty (20) year policy of awarding attorney fees to prevailing tenants. Ungar v. District of Columbia Rental Housing Commission, 535 A.2d 887 (D.C. 1987). He is in error. The appeals court in Jerome Management, Inc. v. District of Columbia Rental Housing Commission, 682 A.2d 178 (D.C. 1996) approved the Commission's denial of attorney fees under the 1985 Act, because the

[6] See Pettaway v. Town Center Management Corp., TP 23,538 (RHC Aug. 10,

equities in the case did not merit an award of attorney's fees. The court stated, "[t]his section creates a 'presumptive award of attorney's fees to the prevailing party - which may be withheld, in the court's discretion, if the equities indicate otherwise.'" Jerome at 186. The Commission rules that the conduct of Brookens of representing tenants as an attorney, after the court of appeals held he was not to hold himself out as an attorney, mitigates against allowing his claim for attorney's fees. Therefore, the claim for attorney's fees is disallowed.

Eighth, Brookens based his request for attorney fees on "settled" cases. The issue of whether attorney fees can be awarded in settled cases depends on the terms of the settlements. Young v. Powell, 729 F.2d 563 (8th Cir. 1984). If the settlement agreements did not settle the issue of attorney's fees, then that issue should be presented to the hearing examiner, since the Commission is an appeals and review agency, D.C. Code § 45-2512(a), and the issue of attorney fees on settled cases requires findings of fact by the hearing examiner.

Attorney's fees was not an issue on appeal to the Commission. The tenants failed to raise this issue before the OAD and cannot raise it now after the Commission's decision on

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1995).

the appeal. An issue not raised before an agency, cannot be raised on appeal. Lenkin Company Management Inc. v. District of Columbia Rental Housing Commission, 642 A.2d 1282 (D.C. 1994).

II. The Housing Provider's Positions

In its opposition to the motion for reconsideration the housing provider repeated its original objections to the motion for attorney fees. Those objections follow.

First, no request for an award for attorney fees was made before OAD. This issue does not preclude the Commission, an appeals agency, from awarding attorney fees for legal services before the Commission, similar to a court of appeals awarding attorney's fees for legal services in appeals cases. See District of Columbia v. Hunt, 525 A.2d 1015 (D.C. 1987) (Hunt II.) However, the Commission does not award attorney's fees for legal services before OAD, because those attorney's fees awards may be appealed to the Commission

Second, inadequate documentation was submitted for the attorney's fees award. The Commission agrees that none of the traditional factors for an award of attorney's fees were addressed in the motion for attorney's fees. See Frazier v. Center Motors, Inc., 418 A.2d 1018, 1025 (D.C. 1980). The tenants did not follow the Commission's rules governing

submissions of requests for attorney's fees. 14 DCMR 3825, D.C. Register (Feb. 6, 1998).

Third, the housing provider argued to the Commission that the 1985 Act does not apply to this case. The Commission followed the plain meaning of the words in the supersedure section of the 1985 Act, which stated that the 1985 Act superseded the 1977 Act. D.C. Code § 45-2593. The explicit legislative direction in the 1985 Act required the Commission to consider whether Brookens was entitled to attorney's fees. Tomasello v. Rubin, U.S. App. D.C., No. 97-5233, Wash. L. Reptr. (Apr. 14, 1999).

III. Conclusion

Notwithstanding our reconsideration of whether Brookens was entitled to attorney's fees, the Commission on reconsideration determined Brookens was not eligible and did not qualify as an attorney entitled to attorney fees under the 1985 Act for the reasons stated above. Moreover, Brookens did

not request attorney's fees on settled cases from the hearing examiner and did not timely appeal the issue of attorney's fees on settled cases to the Commission.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order on Motion for Reconsideration in TP 3788 was mailed postage prepaid this 14 day of May 1999 to the following:

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