DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 4284

In re: 2480 16th Street, N.W., Unit 532

Ward One (1)

BENOIT BROOKENS
Tenant/Appellant

v.

HAGNER MANAGEMENT CORPORATION
Housing Provider/Appellee

DECISION AND ORDER

August 31, 2000

LONG, COMMISSIONER. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), through the Office of Adjudication (OAD), to the Rental Housing Commission (Commission), pursuant to the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. CODE § 45-2501 et seq., and the District of Columbia Administrative Procedure Act (DCAPA), D.C. CODE § 1-1501, et seq. The regulations, 14 DCMR 3800 et seq., also apply.

I. PROCEDURAL HISTORY

Benoit Brookens, who resided at the multi-unit housing accommodation located at 2480 16th Street, N.W., filed Tenant Petition (TP) 4284 on April 11, 1980. The tenant alleged the housing provider, Hagner Management Corporation, directed retaliatory action against him.

The precise procedural history cannot be recounted, because tapes and pleadings were lost during the last two decades. However, the record reflects that Mr. Brookens filed a notice of appeal on November 7, 1986, from a decision issued on March 7, 1986. A copy of the decision and order is not in the certified record. On October 26, 1988, the Commission remanded this case to the Rent Administrator for a de novo hearing, because there was no permanent case file or tape recordings of the adjudicatory hearing. On December 8, 1988, the Adjudication Branch of the RACD directed the parties to file copies of any documents previously submitted, and set February 17, 1989 as the date for the de novo hearing. On February 9, 1989, the housing provider filed a motion to dismiss the petition pursuant to the doctrines of res judicata and collateral estoppel. The record reflects Hearing Examiner Carl Bradford held the adjudicatory hearing on February 17, 1989 and issued a decision and order on May 11, 1989. The record is devoid of pleadings, decisions, or orders between May 11, 1989 and November 10, 1997.

On November 10, 1997, the Commission remanded TP 4284 to OAD for a de novo hearing, because the tape recording of the adjudicatory hearing was not found in the certified record. On February 28, 2000, OAD held the hearing pursuant to the Commission's November 10, 1997 order.[1] Prior to the hearing, the housing provider filed a motion to quash a subpoena that the tenant attempted to serve on John Hoskinson. The tenant submitted an opposition to the motion to quash.

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[1] When the Commission reviewed the OAD hearing tape, the Commission noted the tape ended just as Mr. Luchs' completed arguing his motion to dismiss the appeal. Mr. Luchs stated, "I have nothing further, and the tape stopped. The tape contained the customary introduction by the hearing examiner; the parties' arguments on Mr. Luchs' motion to quash the subpoena; the hearing examiner's ruling on the motion to quash; the swearing of Mr. Brookens; Mr. Brookens' case in chief; the cross-examination by Mr. Luchs; and Mr. Luchs' motion to dismiss the appeal pursuant to the doctrine of res judicata. The Commission's staff contacted Mr. Brookens and Mr. Luchs. Mr. Brookens and Mr. Luchs consented to the Commission's use of the tape. Mr. Luchs indicated he listened to his copy of the tape, and he represented the tape was complete. Mr. Brookens indicated a remand was not desired and consented to a disposition on the merits.

During the February 28, 2000 OAD hearing, the parties presented oral arguments on the motion to quash the subpoena. Following the arguments, the hearing examiner ruled the subpoena was properly served and verbally denied the housing provider's motion to quash the subpoena. However, the housing provider's attorney refused to produce Mr. Hoskinson, arguing the hearing examiner's ruling was incorrect, as a matter of law. Thereafter, the tenant offered evidence on the retaliation claim. Following the presentation of the tenant's argument and cross-examination, the housing provider renewed its motion to dismiss, which it filed on February 9, 1989. The housing provider urged the dismissal of the tenant's claims pursuant to the doctrines of res judicata and collateral estoppel.

On April 17, 2000, the hearing examiner issued the decision and order in TP 4284, and made the following findings of fact.

> 1. There is no evidence that any of the actions taken by the Housing Provider in this case were intended to be, or were in fact retaliatory.
> 2. The claims of retaliation asserted by Tenant/Petitioner herein are identical to the claims of retaliation asserted by Tenant/Petitioner in the following cases: Hagner Management Corporation v. Benoit Brookens, et al., TP 3788 (RAC August 9, 1988); Hagner Management Corporation v. Benoit Brookens, L13051-88 [sic]; Benoit Brookens v. Hagner Management Corporation, Appeal Nos. 81-994, 81-1325, 81-1327, 81-1482, 81-1598 (May 12, 1983); Benoit Brookens v. Hagner Management Corporation, Appeal No. 86-1593 (January 9, 1989).

Brookens v. Hagner Management Corp., TP 4284 (OAD Apr. 17, 2000) at 8-9. The hearing examiner concluded, as a matter of law:

> 1. The Housing Provider has not directed any retaliatory action against Tenant/Petitioner pursuant to D.C. Code 45-2552 (1990).
> 2. The claims of Tenant/Petitioner asserted herein are barred by the doctrine of res judicata.
> 3. All issues in Petition #4284 are dismissed.

Id. at 9.

The tenant noted an appeal on May 3, 2000, and the Commission held the hearing on appeal on June 8, 2000.

II. ISSUES ON APPEAL

The tenant, who alleged summarily that the hearing examiner issued a decision that was not supported by the evidence and misapplied the law, raised the following issues in the notice of appeal:

> Whether the Examiner Erred in Sustaining, Post -hearing [sic], the Landlord's Refusal to Testify; and
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> Whether the OAD has authority to Relinquish Statutory Primary Jurisdiction.

Notice of Appeal at 1.

III. DISCUSSION

A. Whether the hearing examiner erred in sustaining, post-hearing, the housing provider's refusal to testify.

As a preliminary matter to the OAD hearing, the housing provider moved to quash the subpoena that the tenant attempted to serve upon John Hoskinson, because the tenant did not effectuate personal service.[2] The housing provider argued that 14 DCMR 4010, which governs subpoenas, requires personal service in accordance with Superior Court Rule (SUP. CT. R.) 45.

The tenant opposed the motion to quash and argued 14 DCMR 3911, governing service of notice, was controlling. The tenant opined that actual receipt of the subpoena was evidenced by the fact that the housing provider's attorney filed a motion to quash the subpoena. Since actual receipt of service bars any claim of defective service, the tenant

[2] In addition, the housing provider's counsel claimed Mr. Hoskinson had no information that was responsive to the subpoena.

maintains he properly served the subpoena. See 14 DCMR 3911.4. The tenant did not introduce the subpoena or proof of its service.

The tenant's reliance upon 14 DCMR 3911 is misplaced, because § 3911 governs service of notice of pleadings and other documents. The service of subpoenas is not cited in 14 DCMR 3911, because 14 DCMR 4010 governs the service of subpoenas. Additionally, the tenant's reliance on 14 DCMR 3911 fails, because § 3911.7 requires parties to submit written proof of service, including the date, person served, address at which service was made, and the manner of service. The tenant, who failed to supply written proof of the date, manner, or address of service of the subpoena, did not meet the requirements of 14 DCMR 3911.

In the alternative, the tenant argued he properly served Mr. Hoskinson in accordance with SUP. CT. R. 5(b), which prescribes the means of effectuating service of subpoenas on parties. Mr. Brookens indicated, "Mr. Hoskinson received actual service of the subpoena which was delivered to his place of business and left in the care and custody of Lea Franklin, an employee in his office ..." Opposition to Landlord's Motion to Quash Subpoena (Opposition) at 1.

Following the parties' oral arguments, the hearing examiner found the subpoena was properly served and denied the housing provider's motion to quash the subpoena. Richard Luchs, the housing provider's counsel, advised the hearing examiner that he would not produce Mr. Hoskinson, because the hearing examiner's ruling was in direct contravention of SUP. CT. R. 45 and Commission precedent. Mr. Luchs indicated Mr. Hoskinson would only appear if personally served with a subpoena. Mr. Brookens commented upon Mr. Luchs' refusal to produce the witness. However, Mr. Brookens did

not move for compliance.[3] Following the examiner's denial of the motion to quash the subpoena and Mr. Luchs' refusal to produce the witness, Mr. Brookens presented evidence on the retaliation claim raised in the petition.

When the hearing examiner issued the decision and order, he reversed the oral ruling on the motion to quash the subpoena. In the section of the decision entitled Preliminary Matters, the hearing examiner determined the "subpoena was not properly served, because it was not personally served on Mr. Hoskinson as required by the Rental Housing regulation [sic]." Brookens v. Hagner Management Corp., TP 4284 (OAD Apr. 17, 2000) at 2-3. In the brief on appeal, the tenant argued the hearing examiner erred when he changed his ruling after the hearing.

In Lockhart v. Cade, 728 A.2d 65, 69 (D.C. 1999), the Court stated, "judges throughout the land change their minds every day, without appellate consequences. See, e.g., United States v. Green, 134 U.S. App. D.C. 278, 279, 414 F.2d 1174, 1175 (1969) (when trial judge withdrew oral ruling and entered a new order after hearing further argument, original ruling had 'no legal significance' and was not subject to review)." Accordingly, the hearing examiner's reversal of his oral ruling was not reversible error.

In the instant case, the hearing examiner erred during the hearing, when he orally denied the housing provider's motion to quash the subpoena. The hearing examiner's determination, that Mr. Brookens properly served the subpoena, was not supported by the evidence or in accordance with 14 DCMR 4010, which governs service of subpoenas. See discussion infra. When the hearing examiner issued the decision and order, he

[3] Mr. Luchs' refusal to abide by the hearing examiner's oral ruling on the motion to quash is not before the Commission. Consequently, the Commission does not reach Mr. Luchs' conduct on review.

corrected the oral ruling made during the hearing. The "original ruling [made during the hearing] had no legal significance and [i]s not subject to review." Id.

Pursuant to 14 DCMR 4010.4, all subpoenas shall be served on witnesses or parties in accordance with the Civil Rules of the Superior Court of the District of Columbia (SUP. CT. R.). R. 45(b), which prescribes personal service, provides:

> Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person .... Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

The tenant did not satisfy the requirements of SUP. CT. R. 45(b), because the record does not reflect personal service upon Mr. Hoskinson. Mr. Brookens, who acknowledged he did not deliver the subpoena directly to Mr. Hoskinson, argued the examiner erred when he determined the subpoena was not properly served, because SUP. CT. R. 5(b) applies to parties and it does not prescribe personal service. The tenant maintains that personal service is not required upon Mr. Hoskinson, because he is a party.

This argument fails for several reasons. First, the tenant did not introduce definitive evidence to support his assertion that Mr. Hoskinson was a party to TP 4284. During the arguments on the housing provider's motion to quash the subpoena, the tenant stated, "Hoskinson is either an owner or property manager and should be here ... Hoskinson is either a party or property manager." OAD Hearing Tape.

Moreover, the tenant failed to grasp the gravamen of the reference in SUP. CT. R. 45(b) to SUP. CT. R. 5(b). Pursuant to R. 45(b), a command for the production of documents or inspection of premises "shall be served on each party in the manner prescribed by Rule 5(b)." SUP. CT. R. 5(b) provides:

> Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the Court. (emphasis added).
> ....

SUP. CT. R. 5(b) prescribes the means of serving a request for documents upon a party represented by counsel. In accordance with R. 5(b), service upon a party represented by counsel shall be made upon the attorney. Service upon a represented party can only occur upon order of the court [or Rent Administrator under the Act]. Mr. Brookens did not establish that Mr. Hoskinson was a party to TP 4284; he did not introduce proof of service of the subpoena upon Mr. Hoskinson's attorney; he did not introduce an order permitting service upon a party represented by counsel;[4] and Mr. Brookens failed to introduce a subpoena evidencing a command for the production of documents, which triggers the reference in R. 45(b) to R. 5(b).

Assuming, arguendo, that R. 5(b) was controlling, the tenant failed to meet the requirements of R. 5(b), because the record did not evince delivery of the subpoena to Mr. Hoskinson's attorney or the attorney's place of business. Mr. Brookens indicated he delivered the subpoena to Mr. Hoskinson's "place of business and left [it] in the care and custody of Lea Franklin, an employee in his office ...." Opposition at 1. Mr. Brookens relies upon the delivery provision of R. 5(b) to support his argument that service upon an employee in Mr. Hoskinson's office satisfied the delivery requirement of R. 5(b), which provides:

> Delivery of a copy within this Rule means: Handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof.... (emphasis added.)

See Tenant's Brief at 8.

The tenant cannot overcome the R. 5(b) requirement of service upon a party represented by counsel by relying upon the delivery provision of R. 5(b). SUP. CT. R. 5(b), which explicitly speaks to service "within" R. 5, mandates delivery of service upon a party's attorney. If Mr. Hoskinson were a party to TP 4284, Mr. Brookens would have to prove service upon Mr. Hoskinson's attorney. Absent proof of an order permitting service upon a party represented by counsel, service upon a clerk in Mr. Hoskinson's office was not in accordance with R. 5(b).

Mr. Brookens' reliance upon R. 5(b) is misplaced, because he did not introduce evidence to support his assertion that Mr. Hoskinson was a party entitled to service pursuant to R. 5(b); and Mr. Brookens failed to prove he served the subpoena upon Mr. Hoskinson's attorney in accordance with the delivery provision of R. 5(b).

Consequently, the personal service requirement of R. 45(b) is controlling. The tenant failed to satisfy the requirements of R. 45(b), because he did not effectuate personal service upon Mr. Hoskinson. Accordingly, the hearing examiner's determination that the subpoena was not properly served is affirmed, because the tenant did not serve the subpoena in accordance with 14 DCMR 4010 or SUP. CT. R. 45(b).

B. Whether the OAD has authority to relinquish statutory primary jurisdiction.

The tenant raised the above-cited issue, verbatim, in the notice of appeal. In the brief on appeal, the tenant indicated D.C. CODE § 45-2514(c) "provides exclusive jurisdiction to adjudicate claims under Title V of the Rental Housing Act to the Office of Adjudication [sic]. This statute provides a 'presumption' of 'retaliation' under DC MR

[4] During the OAD hearing held on February 28, 2000, Richard Luchs, Esq. indicated that he has represented Hagner Management in TP 4284 since 1980.

[sic] 4303.4 unless the landlord, pursuant to 4305.5 [sic], provides 'clear and convincing evidence to rebut the presumption contained in art. [sic] 4303.4.'" Tenant's Brief at 9. In addition, the tenant, who did not appeal the hearing examiner's bar of his claims pursuant to the doctrine of res judicata, impermissibly challenged the application of res judicata in the brief filed in support of the appeal.

Pursuant to 14 DCMR 3807.4, the Commission's review is limited to the issues raised in the notice of appeal. Parties are permitted to file briefs, which may serve as an appropriate means of developing issues raised on appeal.[5] However, the brief may not be used as a means of advancing issues that were not raised in the notice of appeal. See Joyner v. Jonathan Woodner Co., 479 A.2d 308 (D.C. 1984) cited in Johnson v. District of Columbia, 728 A.2d 70 (D.C. 1999); Frye & Welch Assocs., P.C. v. District of Columbia Contract Appeals Bd., 664 A.2d 1230, 1233 (D.C. 1995). Accordingly, the Commission cannot review the hearing examiner's determination that the doctrine of res judicata barred the tenant's claims; because the tenant attempted to use the brief as a means of advancing the issue, which was not raised in the appeal.

Since the tenant did not appeal the hearing examiner's determination that the doctrine of res judicata barred the tenant's claim, the hearing examiner's dismissal of TP 4284 is not subject to review. However, the Commission reviewed the retaliation issue raised in the appeal, because the hearing examiner issued a finding of fact and conclusion of law on the retaliation issue. The Commission notes the limitations of its review, since the petition was ultimately dismissed.

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[5] See Martinez v. Trainor, 556 F.2d 818 (7th Cir. 1977).

In support of its "statutory primary jurisdiction"[6] issue, the tenant wrote the following:

> The landlord's arguments alone--with this agency's exclusive responsibility for the interpretation and application of the statutory presumption of "retaliation" to cases--without any testimony or documentary evidence to the contrary on the record, is insufficient to support a finding that the landlord presented "clear and convincing evidence" to rebut the statutory mandated "presumption" of "retaliation."

Tenant's Brief at 9-10.

The tenant argues the agency has exclusive responsibility for interpreting the statutory presumption of retaliation. The tenant maintains the hearing examiner erred when he failed to "apply the 'presumption' in exercising his exclusive jurisdictional responsibility to interpret and apply the 'retaliation' provision of the ... Act." Tenant's Brief at 11.

The notion that the agency has exclusive jurisdiction over the statutory presumption of retaliation is not supported by the Act. Pursuant to D.C. CODE § 45-2552, "the trier of fact shall presume retaliatory action has been taken ..." The Act does not indicate that the agency's hearing examiners are the only triers of fact contemplated by § 45-2552. In Espenschied v. Mallick, 633 A.2d 388, 390 (D.C. 1993), the District of Columbia Court of Appeals (DCCA) noted D.C. CODE § 45-2552 "create[d] an explicit retaliatory eviction defense in residential tenancy cases..." The Superior Court of the District of Columbia, routinely applies D.C. CODE § 45-2552, and the DCCA reviews its application. See, e.g., Youssef v. United Management Co., Inc., 683 A.2d 152 (D.C. 1996); De Szunyogh v. William C. Smith & Co., 604 A.2d 1 (D.C. 1992).

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[6] Notice of Appeal at 1.

Accordingly, the tenant's argument that the agency has exclusive jurisdiction to interpret and apply D.C. CODE § 45-2552 fails. In addition, the tenant's position that the hearing examiner erred when he failed to apply the presumption of retaliation fails, because the tenant's position is premised upon the mistaken belief that the presumption of retaliation exists as a matter of law.

The Act's presumption of retaliation is not an automatic entitlement. The presumption does not arise until the tenant demonstrates that he exercised a right, which triggered the presumption, within six months of the housing provider's action. The retaliation provision of the Act, D.C. CODE § 45-2552, provides in relevant part:

> (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:
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> (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;
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> (2) Contacted appropriate officials of the District government ... concerning existing violations of the housing regulations ... or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
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> (3) Legally withheld ... rent after having given a reasonable notice to the housing provider ... of a violation of the housing code;
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> (4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
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> (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
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> (6) Brought legal action against the housing provider.

See also 14 DCMR 4303. The tenant's position that the "statute provides a 'presumption' of 'retaliation' ... unless the landlord ... provides 'clear and convincing evidence to rebut the presumption...'"[7] is contrary to the retaliation provision of the Act.

The presumption of retaliation is triggered when the tenant demonstrates that he engaged in a protected act in the six months preceding the alleged retaliatory conduct. See D.C. CODE § 45-2552(b) 1-6. Contrary to the tenant's assertion, the Act does not provide a presumption of retaliation unless the housing provider introduces clear and convincing evidence to rebut the presumption. Pursuant to D.C. CODE § 45-2552, the Act provides a presumption of retaliation if the tenant engaged in one of six enumerated acts within the six months preceding the housing provider's action.

In De Szunyogh, 604 A.2d at 4, the Court held: "If a tenant alleges acts which fall under the retaliatory eviction statute, D.C. CODE § 45-2552, the statute by definition applies, and the landlord is presumed to have taken 'an action not otherwise permitted by the law' unless it can meet its burden under the statute." (emphasis added.) See also Youssef, 683 A.2d at 155.

In the instant case, the hearing examiner found "[t]here is no evidence that any of the actions taken by the Housing Provider in this case were intended to be, or were in fact, retaliatory." Finding of Fact 1. The hearing examiner concluded, as a matter of law, that the housing provider did not direct any retaliatory action against the tenant. See Conclusion of Law 1. The hearing examiner did not find the tenant proved the exercise of a right that triggered the presumption of retaliation.

Confronted with a similar scenario in Aikens v. Modern Property Management, Inc., TP 23,179 (RHC Oct. 15, 1993), the Commission affirmed the hearing examiner,

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[7] Tenant's Brief at 9.

who concluded the housing provider did not engage in retaliatory conduct against the tenant. The Commission concluded that the tenant failed to prove the housing provider engaged in retaliatory conduct, because the tenant did not prove the exercise of any right that triggered the presumption.

Mr. Brookens focused his appeal on the agency's exclusive jurisdiction to apply an automatic statutory presumption of retaliation, which did not exist. In support of his position, the tenant argued there was "insufficient evidence to support a finding that the landlord presented clear and convincing evidence to rebut the statutory mandated presumption of retaliation." Tenant's Brief at 10. However, there was no record proof to support the tenant's assertion that the hearing examiner found the housing provider presented clear and convincing evidence to rebut the presumption of retaliation.

Mr. Brookens' appeal is devoid of an assertion that he presented evidence, which triggered the presumption of retaliation. The tenant premised his appeal upon the erroneous assumption that the Act provided an automatic presumption of retaliation, and he did not challenge the absence of a determination that the presumption was triggered. Since the Commission's review is limited to the issues raised on appeal, the Commission cannot review an issue that the tenant did not raise.

In accordance with the foregoing discussion, the Commission denies the tenant's assertion that the agency is vested with exclusive jurisdiction to resolve claims under D.C. CODE § 45-2552, because the assertion is not supported by the Act. In addition, the Commission denies the tenant's contention that the Act provides an automatic presumption of retaliation, because the statute prescribes a presumption of retaliation that is triggered if the tenant introduces the prerequisite evidence delineated in D.C. CODE §

45-2552(b) 1-6. Moreover, the tenant's failure to appeal the hearing examiner's dismissal of the retaliation claim pursuant to the doctrine of res judicata, renders moot the retaliation claim, and the dismissal of TP 4284 is not subject to review.

Accordingly, the tenant's appeal issue is denied, and the hearing examiner is affirmed.

IV. CONCLUSION

For the foregoing reasons, the Commission denies the issues raised in the notice of appeal, and affirms the decision and order issued by Hearing Examiner Carl Bradford on April 17, 2000.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 4284 was sent certified mail, postage prepaid, this **31st day of August** to:

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