DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 28,519

In re: 3133 Connecticut Ave., N.W. Apt. 802

Ward Three (3)

B. F. SAUL PROPERTY COMPANY & THE KLINGLE CORPORATION
Housing Providers/Appellants/Cross-Appellees

v.

BLAKE NELSON & WENDY NELSON
Tenants/Appellees/Cross-Appellants

ORDER ON RECONSIDERATION

March 22, 2016

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from an order issued by the Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD), based on a petition filed with the Rental Accommodations and Conversion Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, 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"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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[1] During the pendency of this case, the Office of Administrative Hearings (OAH) assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (RACD) on October 1, 2006, pursuant to § 6(b-1)(1) of the OAH Establishment Act, D.C. Law 16-83, D.C. OFFICIAL CODE § 2-1831.03(b-l)(l) (2012 Repl.). The functions and duties of RACD were transferred to DHCD by § 2003 of the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.). Therefore, although this case originated with RACD, it was subsequently transferred to RAD. *See infra* at n.2.

I. PROCEDURAL HISTORY[2]

On January 26, 2006, Tenants/Appellees/Cross-Appellants Blake Nelson and Wendy Nelson (Tenants), residents of 3133 Connecticut Avenue, NW, Apartment 802 (Housing Accommodation), filed Tenant Petition TP 28,519 (Tenant Petition) with DCRA against B.F. Saul Property Company and the Klingle Corporation (collectively, Housing Provider). Tenant Petition at 1-2; Record for TP 28,519 (R.) at 22-23.

A Proposed Decision and Order was issued on September 24, 2008: Blake J. Nelson & Wendy Nelson v. B.F. Saul Company & The Klingle Corporation, TP 28,519 (RAD Sept. 24, 2008) (Proposed Decision and Order).[3] R. at 861-78. The Proposed Decision and Order invalidated the August 2003 vacancy rent ceiling adjustment, the November 2004 CPI-W rent ceiling adjustment, and the November 2005 CPI-W rent ceiling adjustment, and further determined that the lawful rent ceiling for the Tenants' unit was $1,766. Proposed Decision and Order at 13-14; R. at 865-66. The Proposed Decision and Order rolled back the Tenants' rent charged to $1,766, and awarded the Tenants a rent refund in the amount of $54,790. *Id.*

After receiving exceptions and objections from both the Tenants and the Housing Provider, on March 29, 2010 the Hearing Examiner issued an "Order Denying Exceptions and Objections to September 24, 2008 Decision and Order and Final Decision and Order" (Final

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[2] The Commission notes that a complete procedural history of this case was presented in its February 18, 2016 Decision and Order. The Commission recites herein only those details relevant to the Tenants' Motion for Reconsideration.

[3] The Commission notes that pursuant to the FY 2008 Budget Support Act of 2007, RACD was transferred from DCRA to DHCD, and renamed as the RAD. D.C. Law 17-20, 54 DCR 7052 (Sept. 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (Supp. 2008)).

The Commission's review of the record reveals that the evidentiary hearing was conducted by Hearing Examiner Johnson, and Hearing Examiner Keith Anderson issued the Proposed Decision and Order, in accordance with D.C. OFFICIAL CODE § 2-509(d) (2001).

Order).[4] In addition to the relief awarded to the Tenants in the Proposed Decision and Order, the Final Order fined the Housing Provider $1,000. Final Order at 8-9; R. at 1360-61.

On April 1, 2010, the Housing Provider filed a timely Notice of Appeal with the Commission; subsequently, on April 9, 2010, the Housing Provider filed a timely Amended Notice of Appeal (Amended Notice of Appeal). On April 14, 2010, the Tenants filed a timely Notice of Appeal with the Commission (Tenants' Notice of Appeal).

The Commission issued its Decision and Order in this case on February 18, 2016: B.F. Saul Property Company v. Nelson, TP 28,519 (RHC Feb. 18, 2016) (Decision and Order). In the Decision and Order, the Commission: (1) reversed the Hearing Examiner's determination that the Housing Provider willfully failed to provide proper notice of the 2003 vacancy rent ceiling increase, and vacated the $250 fine related to the 2003 vacancy rent ceiling increase, Decision and Order at 55-58; (2) reversed the Hearing Examiner's order that the Housing Provider could either pay the rent refund to the Tenants or credit the rent refund amount towards the future rent due, and ordered the Housing Provider to pay the rent refund to the Tenants directly, Decision and Order at 75-76; (3) reversed the Hearing Examiner's determination that the applicable interest rate was 4%, the rate in effect on the date of the Proposed Decision and Order, Decision and Order at 77-79; and (4) vacated the Hearing Examiner's calculation of the total interest due to the Tenants because it was not calculated at the correct interest rate, and because it was not calculated through the date of the Final Order, and awarded the Tenants $8,571 in interest on their rent refund. Decision and Order at 77-81.

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[4] The Commission notes that the Final Order is erroneously date-stamped March 29, 2012. *See* Final Order at 1; R. at 1368. The Commission observes that both parties filed their respective notices of appeal with the Commission in April 2010, thus leading the Commission to infer that the actual date of the Final Order is March 29, 2010. Neither party alleges that the Final Order was issued in 2012.

On March 8, 2016, the Tenants filed a Motion for Reconsideration with the Commission. Motion for Reconsideration at 1. No opposition was filed by the Housing Provider.

II. DISCUSSION

The Motion for Reconsideration asserts that the Commission erred in the Decision and Order by calculating the award of interest to the Tenants based on only one fixed interest rate, rather than at a variable, fluctuating interest rate. Motion for Reconsideration at 1. The Tenants explain that in using a fixed interest rate, the Commission has provided an "inappropriate windfall" to the Housing Provider. *Id.* In support, the Tenants contend that the D.C. Court of Appeals (DCCA) has held that post-judgment interest should be awarded at a variable rate, not a fixed rate. *Id.* At 3 (citing Burke v. Groover, 26 A.3d 292, 300 (D.C. 2011)).

In the Decision and Order, the Commission affirmed the Hearing Examiner's use of a fixed interest rate, based on (1) the language of the relevant regulation, 14 DCMR § 3826.3,[5] (2) the Commission's longstanding precedent upholding the use of a fixed interest rate, and (3) the considerable discretion afforded to the Commission in its interpretation of the Act. Decision and Order at 53-55; *see* 14 DCMR § 3826.3; Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 28, 2014) (rejecting the contention that the interest rate should be fluctuating rather than fixed); Dias v. Perry, TP 24,379 (RHC July 30, 2004) (stating that the use of fluctuating interest rates was repealed by 14 DCMR § 3826.3)); Rittenhouse LLC v. Campbell, TP 25,093 (RHC Dec. 17, 2002) (reversing the use of a fluctuating interest rate in favor of a fixed interest rate); *see, e.g.,* Felicity's, Inc. v. D.C. Bd. of Appeals & Review, 851 A.2d 497 (D.C. 2004); Draude v. D.C. Bd. of Zoning Adjustment, 527 A.2d 1242, 1247 (D.C.

[5] 14 DCMR § 3826.3 provides the following: "[t]he interest rate imposed on rent refunds . . . shall be the judgment interest rate used by the Superior Court of the District of Columbia pursuant to D.C. OFFICIAL CODE § 28-3302(c) (2001), on the date of the decision [(emphasis added)]."

1987); *c.f.* Jerome Mgmt. v. D.C. Rental Hous. Comm'n, 682 A.2d 178 (D.C. 1998) (awarding a fluctuating interest rate under a regulation in effect prior to the enactment of 14 DCMR § 3826.3).

The Commission notes that the Tenants' claim in the Motion for Reconsideration is barred by the doctrine of "judicial estoppel." Judicial estoppel prevents a party from taking a position that directly contradicts his or her earlier position in the proceedings. *See, e.g.,* Ward v. Wells Fargo Bank, 89 A.3d 115, 127 (D.C. 2014) (citing Brown v. M St. Five, LLC, 56 A.3d 765, 780 (D.C. 2012)); Kenda v. Pleskovic, 39 A.3d 1249, 1254 (D.C. 2012); *see also,* Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Jan. 12, 2015). The DCCA has set forth three factors to consider in deciding whether to apply judicial estoppel:

> "First, whether a party's later position . . . [is] clearly inconsistent with its earlier position. Second, . . . whether the party has succeeded in persuading a court to accept the party's earlier position . . . . [T]hird[,] . . . whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Ward, 89 A.3d at 127 (quoting Mason v. United States, 956 A.2d 63, 66 (D.C. 2008)).

In this case, the factors weigh in favor of a determination that the Tenants are judicially estopped from asserting that the interest rate should be variable. *See id.* First, the Tenants' claim that the interest rate is variable is clearly inconsistent with the position taken by the Tenants in the Responsive Brief of Tenants. *Id.*; *see* Responsive Brief of Tenants at 32-33 (asserting that the Hearing Examiner's calculation of interest at a fixed rate was correct). Second, the Commission is satisfied that the Responsive Brief of Tenants was at least one factor in persuading the Commission that the interest rate should not be variable. Ward, 89 A.3d at 127; *compare* Decision and Order at 53-55, *with* Responsive Brief of Tenants at 32-33. Third, allowing the Tenants to change their position at this point in the proceedings would give them an

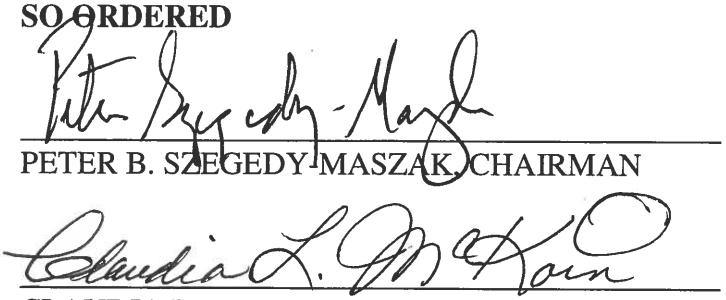
unfair advantage where they asserted one position in their Responsive Brief, contrary to the Housing Provider's position in the matter, and then, after realizing that their position resulted in a less favorable amount of interest, taking the opposite view in their Motion for Reconsideration.[6] Ward, 89 A.3d at 127; *compare* Motion for Reconsideration, *with* Responsive Brief of Tenants at 32-33. Moreover, permitting a change of the Tenant's position would impose an unfair detriment to the Housing Provider with respect to the payment of an additional amount of interest to the Tenants' contrary to the Tenants' initial position supporting a lesser amount. Ward, 89 A.3d at 127; *see* Motion for Reconsideration; Responsive Brief of Tenants at 32-33.

Accordingly, where the Commission is satisfied that the Motion for Reconsideration is barred by the doctrine of judicial estoppel, the Commission denies the Motion for Reconsideration. *See, e.g.,* Ward, 89 A.3d at 127; Kenda, 39 A.3d at 1254; *see also,* Marguerite Corsetti Trust, RH-TP-06-28,207.

VII. CONCLUSION

For the foregoing reasons, the Motion for Reconsideration is denied.

SO ORDERED



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CLAUDIA L. McKOIN, COMMISSIONER

[6] Additionally, the Commission observes that the assertion of the Tenants that the post-judgment interest rate should be variable is inapplicable in this instance where the only interest awarded was pre-judgment interest. *See* Decision and Order at 78 (determining that interest should be calculated through the date of the Final Order).

CERTIFICATE OF SERVICE

I certify that a copy of the **ORDER ON RECONSIDERATION** in TP 28,519 was served by first-class mail, postage prepaid, this **22nd day of March, 2016**, to:

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