

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,794

In re: 4501 Connecticut Avenue, N.W., Unit 809

Ward Three (3)

SMITH PROPERTY HOLDINGS FIVE (D.C.) L.P.
Housing Provider/Appellant

v.

KAREN MORRIS AND DAVID POWER
Tenants/Appellees

DECISION AND ORDER

December 23, 2013

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the District of Columbia (D.C.) Department of Consumer & Regulatory Affairs (DCRA), Housing Regulation Administration (HRA), Rental Accommodations and Conversions Division (RACD).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 D.C. Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501- 2-510 (2001 Supp. 2008), and the D.C. Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

¹ OAH assumed jurisdiction over tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01, -1831.03(b-1)(1) (2001 Supp. 2005). The functions and duties of the RACD were transferred to the Department of Housing and Community Development (DHCD) by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (September 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (2001 Supp. 2008)).

I. PROCEDURAL HISTORY

On September 20, 2006, Tenants/Appellees Karen Morris and David Power (Tenants), residing in Unit 809 of 4501 Connecticut Avenue, N.W. (Housing Accommodation), filed Tenant Petition RH-TP-06-28,794 (Tenant Petition) with DCRA, claiming that the Housing Provider/Appellant, Smith Property Holdings Five (D.C.) L.P. (Housing Provider), violated the Act as follows:²

1. The rent increase was larger than the amount of increase which was allowed by any applicable provision of the Rental Housing Emergency Act of 1985;
2. A property thirty (30) day notice of rent increase was not provided before the rent increase became effective;
3. The Housing Provider failed to file the proper rent increase forms with the Rental Accommodations and Conversion Division;
4. The rent being charged exceeds the legally calculated rent ceiling for my/our unit(s).
5. The rent ceiling filed with the Rental Accommodations and Conversion Division for my/our unit(s) is improper;
6. My/our rent was increased while a written lease, prohibiting such increases, was in effect;
7. The building in which [m]y/our rental unit(s) is located is not properly registered with the Rental Accommodations and Conversion Division;
8. Services and/or facilities provided in connection with the rental of my/our unit(s) have been permanently eliminated;
9. Services and/or facilities provided in connection with the rental of my/our unit(s) have been substantially reduced;
10. Retaliatory action has been directed against me/us by my/our Housing Provider, manager or other agent for exercising our rights in violation of section 502 of the Rental Housing Emergency Act of 1985;

² The Commission recites the Tenants' claims in the same language as they appear in the Tenant Petition, except that the Commission has numbered the claims for ease of reference.

11. A Notice to Vacate has been served on me/us which violates the requirements of section 501 of the Act; [and]
12. The Housing Provider, manager or other agent of the Housing Provider of my/our rental unit(s) have violated the provisions of Section ____ [sic] of the Rental Housing Emergency Act of 1985.

Tenant Petition at 1-5; Record (R.) at 105-109.

On February 13, 2007, Administrative Law Judge Nicholas Cobbs (ALJ) issued a Case Management Order (CMO) that set a hearing date for March 8, 2007. *See* CMO at 1-7; R. at 113-20. On June 20, 2007, the Tenants filed a “Motion for Acceptance of Supplement to Tenant Petition,” which was treated by the ALJ as a Motion to Amend the Tenant Petition (hereinafter “Motion to Amend.” *See* R. at 199-201. The Housing Provider filed an opposition to the Motion to Amend on July 2, 2007. *See* R. at 228-34. The ALJ entered an Order Granting Tenants’ Motion to Amend Petition on July 24, 2007, adding the following three (3) new claims to the Tenant Petition:

- (1) [the] Housing Provider ‘s [sic] April 4, 2007, rent increase is illegal because [the] Housing Provider failed to perfect a 1996 vacancy increase that bears on the 2007 rent increase as well as on a 2006 rent increase that was challenged in the original [T]enant [P]etition;
- (2) [the] Housing Provider reduced related services in the Housing Provider [sic] by cutting back on doorman services and services of a resident engineer; [and]
- (3) [the] Housing Provider engaged in retaliation against [the] Tenants by attempting to breach the parties’ parking agreement.

See Order Granting Tenants’ Motion to Amend Petition at 1-3; R. at 280-82.

After several continuances were granted by the ALJ, a hearing was held in this matter on August 13, 2007. R. at 327-28. On October 21, 2008, the ALJ issued a final order, Morris v.

Order). R. at 51-65. The ALJ made the following relevant findings of fact in the Final Order:³

A. Rent Increases

1. In February 1996 David Power and Karen Morris leased Apartment 809 at 4501 Connecticut Avenue, NW. The initial rent was \$1,185 per month. Petitioner's Exhibit ("PX") 111. I credit Mr. Power's testimony that the apartment was empty when he and Ms. Morris inspected it on February 6, 1996. On the date of the inspection, Housing Provider's property manager required the prospective tenants to sign a notice informing them that Housing Provider had filed a "pending" request to raise the rent ceiling for the unit from \$1,740, to \$2,802 prior to March 31, 1996. Mr. Morris [sic] and Ms. Power [sic] acknowledged the notice in writing. PX 106.
2. Housing Provider documented this rent ceiling adjustment by filing an amended registration form with the RACD on March 29, 1996, 52 days after Tenants signed the notice. PX 105. The amended registration stated that the rent ceiling of Unit 809 was increased from \$1,740 to \$2,802, an increase of \$1,062, or 61%. It justified the rent ceiling increase under Section 213(a)(2) of the Rental Housing Act, D.C. OFFICIAL CODE § 42-3502.13(a)(2) (1996), which, prior to August 2006, allowed a housing provider to increase the rent ceiling of a vacant apartment to match that of a "substantially identical rental unit in the same housing accommodation."
3. On May 22, 1996, less than four months after Tenants moved in, Housing Provider served notice that the rent ceiling would increase \$53 to \$2,855.00 from \$2,802.00 in accord [sic] with the annual adjustment of general applicability, and that Tenants' rent charged would increase \$56 from \$1,185 to \$1,241. PX 111. Mr. Power was angry at this attempt to increase rent so soon after Tenants moved into the apartment. He complained to Housing Provider, and Housing Provider agreed to reduce the rent to its initial level, although Housing Provider did not reduce the rent ceiling.
4. In 2000 Tenants objected to a rent increase that Housing Provider attempted to implement and filed a tenant petition with the Rent Administrator. The petition asserted that the rent increase was illegal and that Housing Provider had reduced services and facilities in the Housing Accommodation. The parties settled. Tenants dismissed the tenant petition in 2001 after Housing Provider agreed to freeze Tenants' rent for two years.

³ The ALJ's findings of fact are recited in this Decision and Order as they appear in the Final Order, except that the Commission has numbered the findings of fact for ease of reference.

5. By March of 2006 Tenants' monthly rent had risen to \$1,909. PX 100. On March 2, 2006, Tenants received a letter from "The Staff of Albemarle House" proposing "flexible lease options." The letter gave Tenants an option to enter into either a 12-month lease at a reduced rent of \$2,185 per month, an 11-month lease for \$2,230, a ten-month lease for \$2,330, a six to nine-month lease for \$2,400, or a one to five month lease for \$2,425. PX 113. The offer required Tenants to respond by March 21, 2006, or have the lease renewed at the higher monthly rate. *Id.* When Tenants did not respond to the offer, Housing Provider followed up with a "friendly reminder" on March 21, 2006, extending the flexible lease option offer to March 23, 2006. PX 114.
6. Tenants continued to ignore Housing Provider's offer to accept a longer lease term in exchange for a lower rent. On March 29, 2006, Housing Provider served Tenants a Notice of Increase in Rent Charged increasing the monthly rent by 26% from \$1,909 to \$2,410, effective May 1, 2006, an increase of \$501 per month (the "May 2006 Rent Increase"). The Notice justified the rent increase as a partial implementation of a rent ceiling increase of \$1,062, effective on March 1, 1996. PX 100.
7. Tenants refused to pay the additional rent. They believed the rent increase was illegal and that Housing Provider was retaliating against them because they refused to accept the offer of the one-year lease. On August 23, 2006, without serving a notice to vacate on Tenants or giving Tenants other prior notice, Housing Provider filed a Complaint for Possession in the Superior Court of the District of Columbia, Landlord and Tenant Branch. PX 115. Tenants then filed the present tenant petition on September 20, 2006. The action for possession was dismissed in November 2006 without prejudice to its renewal.
8. On March 28, 2007, Housing Provider served Tenants with a Notice of Increase in Rent Charged informing Tenants that their rent would increase by \$132 per month from \$2,410 to \$2,542 as of June 1, 2007 (the "June 2007 Rent Increase"). PX 116. Housing Provider attributed the [sic] to an annual adjustment of general applicability under D.C. OFFICIAL CODE § 42-3502.08(h)(2) [(2001)], which, for 2007, was 5.5%. Soon after, on April 4, 2007, Housing Provider also increased the fee for parking at the Housing Accommodation from \$105 to \$175 per month. PX 101. Tenants continued to pay the lower rate until May 2007, when Tenants found a notice on their car stating that it would be towed because it did not have a resident parking decal. Tenants agreed to pay the increased fee and were given a parking label for the windshield.

B. Services and Facilities Issue

9. Tenants' outrage at Housing Provider's 2006 and 2007 rent increases was augmented by their belief that the services and facilities in the building had

declined. Specific conditions that Mr. Morris described included: (1) the building no longer had full time doormen; (2) the front lock on the entrance door to the building was inoperable for two years or more; (3) the building no longer had a resident engineer; (4) Housing Provider did not give Tenants notice of major repair work in Tenants' apartment or arrange for prompt cleanup after the work was performed; and (5) the building elevators were frequently out of service.

10. Until 2003 Tenants' building was serviced by two doormen who were on duty from 7:00 a.m. to 11:00 p.m. In addition, a desk clerk in the building lobby was on duty 24 hours per day. The registrations on file with the RACD do not list doormen service as a service provided with the rent. Respondent's Exhibit ("RX") 200, 205.
11. In 2003 the doorman who covered the morning shift died and was not replaced. A doorman continued on the afternoon shift from 3:00 p.m. to 11:00 p.m. But in the late spring of 2006 the afternoon doorman took medical leave and eventually died after a long illness. He was not replaced until June of 2007. For about a year, from June 2006 to June 2007, the building had no doorman at all, although the 24 hour desk clerk service was not interrupted. Tenants were unhappy with this situation, but they did not complain to the building management about the absence of doormen.
12. The security concerns caused by the absence of a doorman were compounded, in Tenants' view, by Housing Provider's prolonged failure to fix the door to the building entrance. From at least April 2005 to June 2007, the front door would not close fully or lock. PXs 117, 118. Housing Provider was aware of this defect, which was obvious to its maintenance staff and to anyone who entered the building. Although the desk clerk was in a position to see everyone who came in, Tenants and other tenants in the building complained that the unlocked door posed a security problem. In June 2007 Housing Provider replaced the front door with a new door that closed and locked.
13. Prior to the fall of 2005, the building had an engineer who lived in the building. Tenants believed the engineer's residency enabled him to understand the building's maintenance problems and to supervise maintenance projects and contractors carefully. In the fall of 2005, the resident engineer was terminated and replaced by a non-resident maintenance supervisor who was supported by two non-resident service technicians. The supervisor and technicians were on duty from 7:30 a.m. to 5:00 p.m. In addition, an engineer or technician was always on call for emergency work.
14. The Housing Accommodation, an old building, requires continual maintenance and occasional major repair work. The risers, pipes that carry the building's water and sewer lines, were especially problematic. To repair leaks in the risers workmen must break through the walls of tenant

apartments. Contractors had to enter Tenants' apartment to repair risers in the summer of 2005, in the spring of 2006, and in the spring 2007. In 2005, under the old resident engineer, Tenants were given advance notice of the work and the workmen cleaned up the work area carefully. In 2006, Tenants received no notice that workmen would have to gain access to their apartment. The workmen left tools and equipment scattered around the apartment and made no effort to clean up afterwards. PX 120. In 2007 Tenants received a written notice of repairs to the risers that promised to provide "a cleaning crew in behind the contractors to clean up any debris." PX 109. But the workmen left the apartment littered with plaster chips and dust and the promised cleaning crew did not appear. After two days Tenants cleaned up the apartment themselves.

15. Like the risers, the elevators in the building were aging and required frequent maintenance. During 2006 there would be elevator malfunctions two or three times a month, and occasionally two of the building's three elevators were inoperable at the same time. But the outage was usually short. Housing Provider had a contract for elevator maintenance with Avery Elevator Corp., whose technicians respond to calls whenever the elevators malfunctioned.
16. Housing Provider contracted for annual inspections of the elevators by Consolidated Engineering Services. An inspection in October 2004 reported, overall, that the elevators were in "average" condition and that no upgrades or modernization was recommended. RX 202 at 4, 5. Reports in December 2005 and August 2006 made similar findings. [sic] RX 202A at 3, RX 202B at 3, although all three reports noted certain specific deficiencies in particular elevators, including repairs to the freight elevator in 2004 and 2005 that required immediate attention. RX 202 at 11, RX 202A at 10. The reports were accompanied by checklists of some one hundred specific items that had been inspected in each elevator. RXs 203, 203A, 203B.
17. On September 28, 2006, a DCRA inspection cited 16 code violations with the building elevators, although a number of these involved administrative or record-keeping oversights. PX 110. Prompt repairs by Avery Elevator Corp. addressed these concerns. PX 107. The freight elevator seemed to have more serious problems than the passenger elevators. Avery responded to five maintenance calls for the freight elevator from June to September 2006. PX 107.

C. Claims Concerning Registration⁴

⁴ The Commission omits a recitation of the ALJ's findings of fact regarding the Tenants' "claims concerning registration," because neither party has challenged these findings in a notice of appeal. See Final Order at 10; R. at 391.

Final Order at 3-10; R. at 391-98 (footnotes omitted). The ALJ made, in relevant part, the following conclusions of law in the Final Order:⁵

...⁶

B. Tenants' Claims Concerning Improper Rent Increases

1. Tenants' first allegation in the [T]enant [P]etition is that Housing Provider implemented rent increases that were impermissible under the Rental Housing Act. The crux of Tenants' contention is that Housing Provider's May 1, 2006, \$502 rent increase was illegal because it derived from a rent ceiling increase that was not properly taken and perfected. The Housing Regulations, as they applied prior to August 2006, required that a housing provider take and perfect any rent ceiling increase by filing an amended Registration/Claim of Exemption Form with the RACD "as required by § 4103.1." 14 DCMR [§] 4204.9 [(2004)]. The referenced section, in turn, requires that the Registration/Claim of Exemption Form for any rent ceiling increase arising from a vacancy be filed "[w]ithin thirty (30) days after the implementation of any vacant accommodation rent increase pursuant to § 213 of the Act[,] D.C. OFFICIAL CODE § 42-3502.13 [(2001)]." 14 DCMR [§] 4103.1(e) [(2004)].
2. The proper interpretation of these two regulations is challenging because the regulation governing perfection of rent ceiling increases, 14 DCMR [§] 4204.9 [(2004)], incorporates a regulation that applies specifically to rent increases, and makes no mention of rent ceilings. 14 DCMR [§] 4103.1 [(2004)]. But any ambiguity as to the proper application of the Rental Housing Commission's requirements for taking and perfecting rent ceiling increases arising out of vacancies was eliminated by the District of Columbia Court of Appeals in *Sawyer Prop. Mgmt. Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 109 (D.C. 2005), where the court held that "a housing provider must perfect a vacancy adjustment within thirty days of the rental unit becoming vacant."
3. It follows, here, that the vacancy rent ceiling adjustment that Housing Provider implemented in May 2006, was illegal because the underlying adjustment was not properly taken and perfected. Mr. Morris [sic] testified that the apartment was empty when Tenants inspected it on February 6, 2006 [sic], a situation corroborated by Housing Provider's notice of that date that a request for a rent ceiling adjustment was "pending" with the RACD. PX 106.

⁵ The ALJ's conclusions of law are recited in this Decision and Order as they appear in the Final Order, except that the Commission has numbered the conclusions of law for ease of reference.

⁶ The Commission omits from its recitation of the conclusions of law the ALJ's statement of jurisdiction. *See* Final Order at 10; R. at 391.