DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-07-28,985

In re: 6000 13th Street, NW

Ward Four (4)

SHEWAFERAHU KURATU
Tenant/Appellant

v.

AHMED, INC.
Housing Provider/Appellee

RE-ISSUED ORDER ON MOTION FOR RECONSIDERATION[1]

February 6, 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),[2] based on a petition filed in the Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD). 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 Supp. 2008), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899, 1 DCMR §§ 2920-2941, 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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[1] The original Order on Motion for Reconsideration was issued as mistakenly dated "January 29, 2012." (emphasis added). The corrected annual date for re-issuance is "February 6, 2013." (emphasis added).

[2] The Office of Administrative Hearings (OAH) assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA) 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 RACD were transferred to 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[3]

On June 14, 2007, Tenant/Appellant Shewaferahu Kuratu (Tenant), a resident of 6000 13th Street, NW, Unit 301 (Housing Accommodation) filed Tenant Petition RH-TP-07-28,985 (Tenant Petition) with DCRA. Tenant Petition at 3-5; Record (R.) at 11-13. Thereafter, the Tenant filed an Amended Tenant Petition asserting that the Housing Provider had violated the Act as follows:

1. A proper thirty (30) day notice of rent increase was not provided before the rent increase became effective.

2. The Housing Provider failed to file the proper rent increase forms with the Rental Accommodations and Conversion Division.

3. A rent increase was taken while my/our unit(s) were not in substantial compliance with the D.C. Housing Regulations;

4. Services and/or facilities provided in connection with the rental of my/our unit(s) have been permanently eliminated;

5. Services and/or facilities provided in connection with the rental of my/our unit(s) have been substantially reduced; and

6. 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.

Amended Tenant Petition at 3-5; R. at 51-53. On March 7, 2008, the ALJ entered an Order Granting, In Part, and Denying, In Part, Tenant's Motion for Partial Summary Judgment in which she granted summary judgment with respect to Housing Provider's failure to file proper rent increase forms with RACD for the period beginning June 24, 2004, through June 30, 2007, and ordered a rent rollback to $550, and a rent refund. *See* Kuratu, RH-TP-07-28,985 (OAH Mar. 7, 2008) (Order on Summary Judgment) at 2, 27; R. at 126, 152. Summary Judgment was

[3] For the complete procedural history prior to the filing of the Motion for Reconsideration, see Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012).

denied on all other issues. *See id.* at 27-28; R. at 125-26. Evidentiary hearings were held in this matter on March 17, 2008, March 18, 2008, April 22, 2008, and April 23, 2008. R. at 164-65, 184-87. The ALJ issued her Final Order on February 19, 2010. *See* Kuratu, RH-TP-07-28,985 (OAH Feb. 19, 2010) (Final Order) at 1; R. at 220.

On April 21, 2010, Tenant filed a timely Notice of Appeal with the Commission asserting that the ALJ made the following errors:

1. The Administrative Law Judge erred in concluding as a matter of law that electricity was not a related service.

2. The Administrative Law Judge erred in concluding as a matter of law that defects in Housing Provider's rent increase notices do not render the increases invalid.

3. The Administrative Law Judge's conclusion that [T]enant failed to establish that housing code violations existed on the dates rent increases were taken was not supported by substantial evidence on the record.

4. The Administrative Law Judge's conclusion that [T]enant failed to prove any reduction or elimination in services or facilities due to the presence of housing code violations was not supported by substantial evidence on the record.

5. The Administrative Law Judge erred in determining the [H]ousing [P]rovider was not on notice of [T]enant's claim for reduction in service and subsequently erred in failing to rule on Tenant's claim for reduction in services due to the existence of housing code violations.

6. The [A]dministrative [L]aw [J]udge erred in treating a claim for elimination of services differently than a claim for reduction in services.

7. The Administrative Law Judge erred in concluding as a matter of law that Tenant did not suffer a reduction/elimination of service arising from Respondent's failure to abate the rodent infestation.

Notice of Appeal at 1-9. The Commission held a hearing on this matter on November 3, 2011. In a Decision and Order entered on December 27, 2012, the Commission (1) reversed the ALJ's determination that the 2007 notice of rent increase was valid, and remanded for a recalculation of any appropriate rent rollback and rent refund; (2) reversed the ALJ's determination that

electricity was not a related service and remanded for an evidentiary hearing on whether the Housing Provider provided fair notice to the Tenant of the Housing Provider's intention to enforce the original lease term requiring the Tenant to pay for electricity separate from and in addition to his monthly rent and, if necessary, a calculation of any rent refunds or payments owing in accordance with the Decision and Order; and (3) affirmed the ALJ on all other issues. *See* Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012) (Decision and Order).

The Tenant filed a timely Motion for Reconsideration of the Commission's Decision and Order on January 14, 2013. *See* Motion of Tenant/Appellant for Reconsideration at 1 (hereinafter Tenant's Motion for Reconsideration).

II. MOTION FOR RECONSIDERATION

The Commission's regulations establish the following legal standard for a motion for reconsideration under 14 DCMR § 3823.1 (2004):

> [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; provided, that an order issued on reconsideration is not subject to reconsideration.

Under the Commission's rules, a motion for reconsideration "[s]hall set forth the specific grounds on which the applicant considers the decision and order to be erroneous or unlawful." 14 DCMR § 3823.2 (2004). Denial of a motion for reconsideration will result from a party's failure to set forth such specific grounds of error or illegality in the Commission's decision. *See, e.g.*, Stone v. Keller, TP 27,033 (RHC Mar. 24, 2009) at 11 - 14; Tenants of 5112 MacArthur Blvd., N.W. v. 5112 MacArthur L.P., CI 20,791 (RHC July 2, 2004); Byrd v. Reaves, TP 26,195 (RHC Aug. 8, 2002). The Tenant in this case requested reconsideration on the following grounds:

1. The electricity clause is void *ab initio* because it represents an unlawful attempt to carry out a reduction of services without observing the procedural requirements of the Rental Housing Act.

2. Authorities that construe common-law contractual concepts of withdrawing waiver are inapposite to this case because the contractual term in question is subject to the regulatory scheme created by the Rental Housing Act.

3. Alternatively, the Commission should determine without remanding that Housing Provider at no point has provided the notice required by Grubb and related cases.

Tenant's Motion for Reconsideration at 4-6.

III. DISCUSSION

A. Whether the electricity clause is void *ab initio* because it represents an unlawful attempt to carry out a reduction of services without observing the procedural requirements of the Rental Housing Act.

The Tenant argues in the Motion for Reconsideration that a 1985 Registration Statement filed for the Housing Accommodation by a previous owner lists electricity as a related service and is the controlling document in this case. *See* Tenant's Motion for Reconsideration at 6-12. The Tenant further asserts that a 1996 amendment to the Registration Statement that does not list electricity as a related service was not sufficient to reduce the services at the Housing Accommodation. *See id.* at 8.

The Commission's precedent is clear that a party cannot pursue a claim that arose more than three (3) years prior to the filing of the tenant petition. D.C. OFFICIAL CODE § 42-3502.06(e) (2001). *See* Willoughby Real Estate Co., Inc. v. Shuler, TP 28,266 (RHC Nov. 7, 2008) (holding that tenant's claim was barred because it occurred more than three years prior to the filing of the tenant petition); Canales v. Martinez, TP 27,535 (RHC June 29, 2005) (explaining that the statute of limitations "bars any investigation of the validity of rent levels...implemented more than three (3) years prior to the date of the filing of the tenant petition") (*quoting* Vicente v. Anderson, TP 27,201 (RHC Aug. 20, 2004)); Amiri v. Gelman

Mgmt. Co., TP 27,501 (RHC Oct. 20, 2003) (determining that claim of housing code violations that had existed for eight (8) years prior to the filing of the tenant petition was barred by the statute of limitations). The Tenant Petition in this case was filed on June 14, 2007. *See* Tenant Petition at 1; R. at 15. Any claims that the Tenant makes related to the validity or interpretation of a 1996 Registration Statement or a 1985 Registration Statement are barred by the three-year statute of limitations under the Act. D.C. OFFICIAL CODE § 42-3502.06(e) (2001); Willoughby Real Estate Co., Inc., TP 28,266; Canales, TP 27,535; Amiri, TP 27,501. Accordingly, the Commission denies reconsideration of this issue.

B. Whether authorities that construe common-law contractual concepts of withdrawing waiver are inapposite to this case because the contractual term in question is subject to the regulatory scheme created by the Rental Housing Act.

In the December 27, 2012 Decision and Order, the Commission determined that there was substantial evidence of an extended course of conduct by the Housing Provider in not requiring the Tenant to make a payment for electrical services, contrary to a clause in the parties' lease agreement, separate from and in addition to his payment of the monthly rent. Decision and Order at 21. That course of conduct, the Commission held, constituted a "waiver" of the lease provision that required the Tenant to pay for electricity in addition to his monthly rental payment. *See id.* (*citing* Entrepreneur, Ltd. v. Yasuna, 498 A.2d 1151, 1161-62 (D.C. 1985); Pearson v. George, 77 S.E.2d 1, 6 (Ga. 1953); Paul Pleating & Stitching Co. v. Levine, 242 N.Y.S. 729, 732 (N.Y. 1930)). Additionally, the Commission stated that waiver of a lease term does not prevent future enforcement of that term, provided that the landlord must first give "fair notice and warning" to the tenant regarding the renewed enforcement of such term. *See id.* (*citing* Grubb v. WM. Calomiris Inv. Corp., 588 A.2d 1144, 1146 (D.C. 1991); Pritch v. Henry, 543 A.2d 808, 813 (D.C. 1988)).

The Commission further determined that once the Housing Provider had waived the provision of the lease requiring the Tenant to pay for electricity and provided electrical service to the Tenant on the apparent basis of his monthly rental payment, the provision of electricity to the Tenant became the responsibility of the Housing Provider and a "related service" for purposes of the Act. *See id.* at 22 (*citing* D.C. OFFICIAL CODE §§ 42-3501.03(27), -3502.11 (2001); 14 DCMR § 500.1 (2004); 14 DCMR §§ 600.1, -.3 (2004); 14 DCMR § 4216.2 (d) (2004)). Thereafter, based upon its review of the record and the relevant precedent from the District of Columbia Court of Appeals (DCCA), the Commission determined that the Housing Provider was entitled to enforce the lease term requiring the Tenant to pay for electricity so long as he first gave the Tenant fair notice and warning. *See id.* The Commission's Decision and Order did not define what would constitute the requisite "fair notice and warning." *See id.* at 22-23.

The Tenant maintains in the Motion for Reconsideration that "elimination of a related service is subject not only to Grubb's notice requirements, 588 A.2d at 1146, but also to the procedures described in the Rental Housing Act." Tenant's Motion for Reconsideration at 5. The Tenant asserts that "where waiver of a lease provision has established a related service under the Rental Housing Act, a housing provider who seeks to enforce that term must comply with...the filing, rent adjustment and prior approval requirements of the Rental Housing Act." *See id.* at 14.

Based upon its review of the Tenant's Motion for Reconsideration and the record, the Commission is persuaded that it unnecessarily limited the remedy in this case based upon principles of contract law, i.e. requiring the landlord to give fair notice and warning prior to enforcing the electricity clause of the lease agreement. The Commission is satisfied that an appropriate remedy was available under the Act. The Act requires that, if a housing provider

substantially decreases the related services supplied for a rental unit, a tenant is entitled to a decrease in rent proportionate to the value of the change in services. *See* D.C. OFFICIAL CODE § 42-3502.11 (2001).[4] If a housing provider wants to change the level of services provided to a tenant, he must file a petition with the Rent Administrator. *See* 14 DCMR §§ 4211.1, 4211.5 (2004).[5] Accordingly, upon reconsideration, the Commission observes that once it determined that the provision of electricity became a "related service" for purposes of the Act, the Housing Provider's appropriate method for shifting the responsibility of provision of electricity to the Tenant in compliance with the Act is to file a related services petition with the Rent Administrator. D.C. OFFICIAL CODE §§ 42-3502.11 (2001); 14 DCMR §§ 4211.1, 4211.5 (2004).

For the reasons stated above, the Commission vacates the following portions of the December 27, 2012 Decision and Order: (1) the Commission's determination that the Housing Provider was entitled to enforce the lease provision requiring the Tenant to pay for electricity

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[4] The provision is as follows:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

D.C. OFFICIAL CODE §§ 42-3502.11 (2001). The "Rent Control Reform Amendment Act of 2006" amended the Act by eliminating "rent ceiling", and, in its place, substituting the term "rent charged." D.C. OFFICIAL CODE § 42-3502.06(a) (2001 Supp. 2008). *See,* D.C. Law 16-145, §§ 2(a) & (c), 53 D.C. Reg. at 4889, 4890 (2006).

[5] 14 DCMR § 4211.1 (2004) provides the following:

> A housing provider who has changed or proposes to change the related services or facilities at a rental unit or housing accommodation may petition the Rent Administrator for a rent ceiling adjustment under § 211 of the Act (a "related services or facilities petition") to reflect the monetary value of the change.

14 DCMR § 4211.5 provides:

> A housing provider shall not change substantially related services or facilities in violation of § 4211.2 or decrease substantially related services or facilities at a rental unit or housing accommodation without the prior approval of the Rent Administrator.

services after giving the Tenant fair notice and warning; and (2) the Commission's remand to OAH for an evidentiary hearing on when, if at all, the Housing Provider gave the Tenant fair notice of his intent to enforce the lease provision requiring the Tenant to pay for electricity and a calculation of any resulting damages.

Upon granting the Tenant's Motion for Reconsideration, the Commission hereby remands this case to OAH for a determination and issuance of additional findings of fact and related conclusions of law which specifically articulate an appropriate remedy under the Act for the Housing Provider's failure to comply with the Act's provisions regarding related services and facilities, specifically D.C. OFFICIAL CODE §§ 42-3502.11, -3509.01(a)(2) (2001), and 14 DCMR §§ 4211.1, 4211.5, 4217.1 (2004).[6] In the ALJ's discretion, the requisite additional fact-finding can either be based upon the existing hearing record or upon an additional evidentiary hearing focused exclusively on the determination of an appropriate remedy under the Act in compliance with D.C. OFFICIAL CODE § 42-3509.01(a)(2) (2001) and 14 DCMR § 4217.1 (2004). The additional fact-finding would address the valuation of any reduction in the related electricity service and a calculation of any appropriate rent rollback and/or rent refund owed to the Tenant

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[6] D.C. OFFICIAL CODE § 42-3509.01(a)(2) (2001) provides the following:

> Any person who...(2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

14 DCMR § 4217.1 (2004) provides as follows:

> Where it has been determined that a housing provider knowingly demanded or received rent above the rent ceiling for a particular rental unit, or has substantially reduced or eliminated services previously provided, the Rent Administrator or the Commission shall invoke any or all of the following types of relief:
>
> (a) A rent refund; and
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> (b) Treble the amount of the rent refund ordered paid; or
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> (c) A rent rollback for a specific period or until specific conditions are complied with.

as a result of the Housing Provider's failure to comply with D.C. OFFICIAL CODE §§ 42-3502.11, 3509.01(a)(2) (2001), and 14 DCMR §§ 4211.1, 4211.5, 4217.1 (2004). Additionally, the Commission remands to OAH for the ALJ to enter an order instructing the Housing Provider to hereafter comply with D.C. OFFICIAL CODE §§ 42-3502.11 (2001) and 14 DCMR §§ 4211.1, 4211.5 (2004) regarding the provision of related services and facilities at the subject Housing Accommodation.

C. Alternatively, whether the Commission should determine without remanding that Housing Provider at no point has provided the notice required by Grubb and related cases.

The Tenant's Motion for Reconsideration urges the Commission to determine that the Housing Provider began attempting to enforce the lease provision requiring the Tenant to pay for electricity without providing the type of fair warning and notice required under Grubb, 588 A.2d at 1146 and Pritch, 543 A.2d at 813, and further requests an award of damages arising from the Housing Provider's failure to provide proper notice. *See* Tenant's Motion for Reconsideration at 14-17. The Commission's decision regarding Issue B above, which requires a determination by the ALJ of an appropriate remedy for the Tenant for the Housing Provider's violation of the Act, renders this issue moot. *See supra* at 6-10. The Commission thus denies reconsideration of this issue.

IV. CONCLUSION

In accordance with the foregoing, the Tenant's Motion for Reconsideration is hereby granted with respect to a remand to OAH for findings of fact and conclusions of law regarding an appropriate remedy under the Act for the Housing Provider's violation of provisions of the Act regarding related services – in this case, the provision of electrical services. *See* D.C. OFFICIAL CODE §§ 42-3502.11, 3509.01(a)(2) (2001), and 14 DCMR §§ 4211.1, 4211.5, 4217.1

(2004). Reconsideration is hereby denied with respect to all other issues. The Commission thus remands this case to OAH for the following: (1) the determination and issuance of additional findings of fact and related conclusions of law specifically addressing the appropriate remedy under the Act resulting from the Housing Provider's failure to comply with the provisions of the Act related to provision of related services and facilities, specifically D.C. OFFICIAL CODE §§ 42-3502.11, 3509.01(a)(2) (2001), and 14 DCMR §§ 4211.1, 4211.5, 4217.1 (2004);[7] and (2) the entry of an order instructing the Housing Provider to hereafter comply with D.C. OFFICIAL CODE §§ 42-3502.11 (2001) and 14 DCMR §§ 4211.1, 4211.5 (2004) with respect to the provision of related services and facilities at the subject Housing Accommodation.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

MARTA W. BERKLEY, COMMISSIONER

JUDICIAL REVIEW

Pursuant to DC 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 may be contacted at the following address and telephone number:

[7] As noted *supra* at 9, in the ALJ's discretion, the additional fact-finding can either be based upon the existing hearing record or upon an additional evidentiary hearing focused exclusively on the determination of an appropriate remedy under the Act. The additional fact-finding would address the valuation of any reduction in the related electricity service and a calculation of any appropriate rent rollback and/or rent refund owed to the Tenant as a result of the Housing Provider's failure to comply with D.C. OFFICIAL CODE §§ 42-3502.11, -3509.01(a)(2) (2001), and 14 DCMR §§ 4211.1, 4211.5, 4217.1 (2004).

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **RE-ISSUED ORDER ON MOTION FOR RECONSIDERATION** in RH-TP-07-28,985 was mailed, postage prepaid, by first class U.S. mail on this **6th day** of **February, 2013** to:

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