

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-08-29,149

In re: 2950 Van Ness Street, N.W., Unit 923

**SMITH PROPERTY HOLDINGS
CONSULATE, LLC**
Housing Provider/Appellant

v.

BRADY LUTSKO
Tenant/Appellee

DECISION AND ORDER

March 10, 2015

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 Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD).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.

¹ OAH assumed jurisdiction over tenant petitions from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD) pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to DHCD by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

I. PROCEDURAL HISTORY

On January 3, 2008, Tenant/Appellee Brady Lutsko (Tenant), resident of 2950 Van Ness Street, N.W., unit 923 (Housing Accommodation) filed Tenant Petition RH-TP-08-29,149 (Tenant Petition) with RAD, against Smith Property Holdings Consulate, LLC (Housing Provider). *See* Tenant Petition at 1-5; Record for RH-TP-08-29,149 (R.) at 1-5. The Tenant Petition raised the following claims against the Housing Provider:

1. The building where my/our rental unit(s) is located is not properly registered with the RAD.
2. The landlord (housing provider), manager, or other agent has taken retaliatory action against me/us in violation of Section 502 of the Act.

Tenant Petition at 2; R. at 4.

A hearing was held on this matter on April 24, 2008. R. at 63. A Final Order was issued on July 8, 2008, Lutsko v. Smith Property Holdings Consulate, LLC, RH-TP-08-29,149 (OAH July 8, 2008) (Final Order); R. at 36-103.

The ALJ made the following findings of fact in the Final Order:²

A. Housing Provider's Failure to Notify Tenant/Petitioner of its Exemption from the Rent Stabilization Provisions of the Act.

1. Tenant/Petitioner began leasing Unit 923 at the Property from the Housing Provider/Respondent on September 10, 2002. The lease was for one year at \$1,299 per month, ending September 30, 2003. Petitioner's Exhibit "PX" 103.
2. Housing Provider/Respondent filed its [R]egistration/[C]laim of [E]xemption form with RAD on August 18, 1999, indicating the building was constructed after December 31, 1975, and therefore exempt from the rent stabilization provisions of the Act. However, it did not notify Tenant/Petitioner of this exemption in its lease agreement. PX 100, Respondent's Exhibit ("RX") 200.

² The findings of fact are recited here using the language of the ALJ in the Final Order.

3. There are two versions of the Housing Provider/Respondent's Registration/Claim of Exemption form filed with RAD, PX[]100 and RX 200. The Registration/Claim of Exemption [f]orm filed with the RACD [sic] contains seven pages, including a page that water and sewer fees were included in the rent. PX 100.
4. Housing Provider's version omits the services and facilities information that is part of the form. Respondent's Exhibit "RX" 200.
5. Housing Provider/Respondent did not post its [R]egistration/[C]laim of [E]xemption form in a public place or its management office or on its premises during the relevant time period January 3, 2005 through January 3, 2008, which was the relevant period of Tenant/Petitioner's tenancy.
6. Housing Provider/Respondent did not notify Tenant/Petitioner of its claim of exemption prior to, during, or after the execution of the lease.
7. Housing Provider/Respondent knew or should have known that the [R]egistration/[C]laim of [E]xemption form was not posted in compliance with the Act, and was not provided with Tenant/Petitioner's rental application, nor was [sic] mailed to Tenant/Petitioner.
8. Housing Provider/Respondent intentionally omitted posting the complete [R]egistration/[C]laim of [E]xemption form because the completed form disclosed that water [and] sewer usage fees were to be included in the tenants' rent, but the Tenant/Petitioner was charged additionally and separately for this [sic] utility charge[s] during the relevant time period of January 3, 2005 through January 5, 2008.
9. Housing Provider/Respondent knew that failure to notify Tenant/Petitioner of its Registration/Claim of Exemption form and failure to post it was a violation of the Act.
10. There is no evidence that Housing Provider filed an amended registration statement indicating that water [and] sewer charges were not included in a tenant's rent within 30 days of September 2002, which is when Tenant/Petitioner began paying \$15 per month additionally for water usage.
11. There is no evidence that Housing Provider filed a petition pursuant to 14 District of Columbia Municipal Regulations (DCMR) [§] 4211.1 that it proposed to change the related services or facilities, i.e. water and sewer charges at the [H]ousing [A]ccommodation before, during and after Tenant/Petitioner's tenancy.

B. Invalid Increases in Tenant/Petitioner's Rent

12. In the narrative portion of the [T]enant [P]etition, Tenant/Petitioner specifically requests that this administrative court “reverse [the Housing Provider’s] illegal rent increase and penalty for not signing new terms.”
13. On July 28, 2003, Tenant/Petitioner received notice from the Housing Provider that effective October 1, 2003, his monthly rent would be adjusted from \$1,299 to \$1,338 or \$1,438 if he chose the month-to-month option. PX 103, page 1.
14. Tenant/Petitioner chose the month-to-month option and began paying rent of \$1,438 as of October 1, 2003. PXs 102 and 103.
15. Tenant/Petitioner continued paying rent of \$1,438, during the relevant time period of this proceeding until December 2007, when he paid \$1,875 in response to another notice of rent increase. PX 102, page 2, PX 104.
16. Tenant/Petitioner began paying \$1,875 for the December 2007 rent, which was the option offered for a ten-month lease. PX 104, pages 1 and 3.
17. Tenant/Petitioner received notice of the second rent increase on September 13, 2007, which was effective December 2007 and increased Tenant/Petitioner’s rent from \$1,438 as a month-to-month tenant to \$2,120 as a month-to-month tenant, assuming Tenant/Petitioner signs a new lease. PX 104.
18. This notice of rent increase dated September 13, 2007, was not filed with the Rent Administrator.
19. Tenant/Petitioner paid the \$1,875 for the December 2007 rent without signing a new 10-month lease. Because there was such a huge disparity in the rent increase from \$1,438 to \$2,120 as a month-to-month tenant if a new lease was signed, Tenant/Petitioner was denied a meaningful choice.
20. Housing Provider/Respondent assessed Tenant/Petitioner a \$245 charge for breaking the 10-month lease and also assessed him rent at \$2,120 for January 2008, PX 102, page 3, which is the rent amount for a month-to-month tenant. PX 104, page 1.
21. Tenant/Petitioner vacated the premises effective January 15, 2008, because he could not afford the substantial increase in rent and also would not agree to negotiate a brand new lease with substantial changes in the provisions of the lease. PX 102, page 3.
22. Housing Provider submitted a final bill to Tenant/Petitioner. Tenant/Petitioner paid \$1,298.98 on this final bill prorated through January 15, 2008. PX 102, page 3.

C. Improper Water Usage Charges Inconsistent with Housing Provider's Registration[/]Claim of Exemption Form

23. When Tenant/Petitioner signed his lease in 2002, there was an addendum he signed in which he agreed to a flat-rate fee of \$15 per month for water usage. PX 102, page 4. This \$15 flat fee for water usage was also identified on Housing Provider's pricing form dated July 11, 2002. PX 102, page 4. PX 103.
24. In June 2004, Housing Provider hired a third-party to bill water based on a ration utility billing system that bills tenants for a portion of the buildings total water bill based on a square footage allocation, which resulted in an additional \$438.42 in fees charged to him. (Tenant petition narrative paragraph six.) These additional fees commenced in June 2004.
25. The Housing Provider's certified Registration/Claim of Exemption form consisting of three pages, and presented by the Housing Provider, RX 200, is substantially different from the Registration/Claim of Exemption form Tenant/Petitioner received from the Rent Administrator consisting of six pages. PX[]100.
26. Housing Provider's Registration/Claim of Exemption form filed with the Rent Administrator represents that water and sewer charges are part of the rent a tenant pays, when it is not. PX 100, page 5. Housing Provider/Respondent had reason to conceal the complete Registration/Claim of Exemption form because it failed to file the necessary amended registration statement within the 30 day time period allotted by law, when a change is made such as charging tenants separately for water and sewer.
27. The amended registration form should have been filed no more than 30 days after it began billing tenant separately for water and sewer fees. Tenant/Petitioner's lease commenced in October 2002 with water [and] sewer charges being billed separately. Therefore, the Housing Provider should have, but did not file an amended registration form before 2002, which reflected water [and] sewer charges were no longer inclusive with a tenant's rent. Nor did Housing Provider file a petition pursuant to 14 DCMR [§] 4211.1 that it proposed to change the related services or facilities, i.e. water and sewer charges at the [H]ousing [A]ccommodation.
28. By concealing the complete Registration/Claim of Exemption form from tenants consisting of six pages, PX 100, it enabled Housing Provider to charge tenants separately for water and sewer usage without letting them know it should have been included with the tenants' rent.

29. By concealing the complete Registration/Claim of Exemption form from tenants, consisting of six pages, PX 100, tenants were not aware that Housing Provider's water and sewer charges were illegal.
30. Tenant/Petitioner paid \$1,111.59 for water and sewer and other utilities charges from June 2004 through January 15, 2008. PX 102, page 2.
31. Housing Provider's failure to notify Tenant/Petitioner of its Registration/Claim of Exemption filing was intentional misrepresentation because it caused Tenant/Petitioner to not be aware that he overpaid water usage and sewer charges from the date of his tenancy through the date of the termination in his tenancy January 15, 2008, because Housing Provider did not petition the Rent Administrator in compliance with 14 DCMR [§] 4211.1 that it proposed to change the related services or facilities, i.e. water and sewer charges at the [H]ousing [A]ccommodation nor file an amended registration statement that a tenant's services and facilities no longer included water and sewer expenses.

D. Tenant/Petitioner's Claims of Retaliation

32. From July 21, 2006, through May 1, 2007, Tenant/Petitioner made ongoing complaints about second hand smoking odors inside his apartment. PX 101.
33. The second hand smoke odor was coming from nearby apartments and filtering into Tenant/Petitioner's unit and posed a serious threat to Tenant/Petitioner's health. PX 106, page 12.
34. Housing Provider/Respondent knew that the Tenant had a duty and right to report the second hand smoke odor problem under the terms of his lease. PX 1[0]3, page 5. The second hand smoke odor was also a ventilation problem in Tenant/Petitioner's unit which existed more than two days and Housing Provider had not promptly corrected the ventilation problem in Tenant/Petitioner's unit.
35. Two individuals visiting Tenant/Petitioner's unit during his tenancy also observed a strong odor of cigarette smoke on various occasions. PX 106, page[s] 1 and 12.
36. On September 13, 2007, Tenant/Petitioner received notice from the Housing Provider/Respondent that his rent would increase to \$1,875 if he chose a new 12-month lease or \$2,120 per month if he chose to continue to be a month-to-month tenant. PX 104, page 1.
37. Tenant/Petitioner paid a \$245 penalty for refusing to sign a new lease. (Tenant [P]etition, narrative paragraph 5, PX 102, page 3.)

38. On October 10, 2007, Housing Provider/Respondent notified Tenant/Petitioner for the first time by email that the Property is not a rent controlled building, and therefore, pricing is based on market conditions. PX 101, page 5. Tenant/Petitioner did not receive a true copy of the Registration/Claim of Exemption form at that time.
39. Advertised rates for a one-bedroom unit at The Consulate from October 2007 through February 2008 ranged from \$1[,]385 per month to \$1,675 per month on Craigslist. PX 105, page 1.
40. Housing Provider/Respondent also advertised via its www.archstoneapartments.com website, that its one-bedroom units at the Property were renting for \$1660-\$1785 per month in October 2007. PX 106, page 3.
41. On October 11, 2007, Housing Provider/Respondent, through its agent Eileen McKenzie, informed Tenant/Petitioner that its renewal raters were not negotiable. PX 101, page 4.
42. Aimee Storm contacted the Housing Provider/Respondent on October 9, 2007, and was advised by Eileen McKenzie that the current leasing rate for a one-bedroom apartment at the Property runs \$1,680 per month. PX 106, page 12.
43. Because Housing Provider/Respondent demanded a rent from Tenant that was considerably greater than the rents that Housing Provider advertised in its listings, I find that Housing Provider, by and through its agent Eileen McKenzie, intentionally misrepresented to Tenant/Petitioner in its October 10, 2007, email, that the Housing Provider would be leasing Tenant/Petitioner's unit for \$1,835 per month in December 2007, which was the market rate. PX 105, page 5.
44. Based on its advertising rates from the time period of September 2007 through December 2007, Housing Provider knew or should have known that the market rate of \$1,835 per month in December 2007, quoted to the Tenant/Petitioner was patently false.
45. Housing Provider knowingly and intentionally misrepresented the patently false market rate of \$1,835 per month in December 2007, to Tenant/Petitioner for the purpose of coercing Tenant/Petitioner to sign a new lease with entirely different terms and at an exorbitant rent increase that would result in him accepting the unreasonable rent increase and changes, or leaving by coercion.

Final Order at 3-10; R. at 94-101. The ALJ made the following conclusions of law in the Final Order:³

1. The [H]ousing [A]ccommodation was registered with RAD in 1999, but in accordance with the Act [sic], Respondent failed to notify Tenant/Petitioner of the exemption of his rental unit under the Act, which renders the registration void *ab initio*;
2. The rent increases implemented by Respondent in 2007 were invalid because Respondent did not file the proper rent increase forms with RAD as required by 14 DCMR [§] 4205.4 after it failed to properly notify Tenant/Petitioner of its exemption;
3. The rent increase from \$1,438 to \$2,120 as a month-to-month tenant was a huge disparity. Tenant/Petitioner was denied a meaningful choice because the choice presented by the Housing Provider conflicted with Section 42-3505.01 of the Act, because it denies the Tenant/Petitioner a meaningful opportunity to remain as a month-to-month tenant;
4. Tenant/Petitioner's second hand smoke odor he complained of was a ventilation problem in the unit that violated Title 14, Chapter 5 of the housing regulations;
5. Respondent directed retaliatory action against Tenant/Petitioner in violation of the Act when Housing Provider/Respondent demanded an improper rent increase in 2007 after he complained of second hand smoke odor in his apartment;
6. Housing Provider's actions in failing to notify Tenant/Petitioner of its complete Registration/Claim of Exemption form filed with RAD by mail or delivery to Tenant/Petitioner, and its failure to renew Tenant/Petitioner's lease based on the existing lease terms were knowing and willful violations of the Act; and
7. There is no evidence that Housing Provider filed a petition pursuant to 14 DCMR [§] 4211.1 or an amended registration statement within 30 days of implementing the change of having water and sewer charges excluded from tenants' rent as required by the Act. *See* D.C. Official Code § 42-3502.05 (g) under the former provisions of the Act, and D.C. Official Code § 42-3502.05 (g)(1)(C) under the current provisions of the Act.

³ The conclusions of law are recited here using the language of the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.