DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-09-29,593

In re: 1400 Irving Street, N.W., Unit 423

Ward One (1)

HIGHLAND PARK APARTMENTS
Housing Provider/Appellant

v.

CHRISTOPHER SUTTON
Tenant/Appellee

DECISION AND ORDER

September 27, 2013

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a decision and 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 (Rental Housing 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- 2-510 (2001 Supp. 2008), 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] The OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversions Division (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 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)). Accordingly, this case was transferred from the Rent Administrator to OAH on March 8, 2007. *See* Martin, RH-TP-6-28,222 (OAH May 11, 2007) (Case Mgmt. Order) at 1.

I. PROCEDURAL HISTORY

On May 13, 2009, Tenant/Appellee Christopher Sutton (Tenant), residing at 1400 Irving Street, N.W., Unit 423, Washington, D.C. 20010 (Housing Accommodation), filed Tenant Petition RH-TP-09-29,593 (Tenant Petition) against Housing Provider/Appellant Highland Park Apartments (Housing Provider) claiming the following violation of the Act:

> 1. The landlord (housing provider), manager, or other agent has taken retaliatory action against me/us in violation of Section 502 of the Act.

See Tenant Petition at 1-2; Record (R.) at 20-21. Thereafter, on August 19, 2009, a Case Management Order (CMO) was issued setting a hearing date for October 19, 2009. CMO at 1-8; R. at 30-38. An evidentiary hearing was held before Administrative Law Judge (ALJ) Hines on October 19, 2009. R. at 39.

On September 21, 2010, the ALJ issued a final order, Sutton v. Highland Park Apartments, RH-TP-09-29,593 (OAH Sept. 21, 2010) (Final Order). In the Final Order the ALJ made the following findings of fact:[2]

> 1. On June 18, 2008, Tenant moved into the Housing Accommodation located at 1400 Irving Street NW, Unit 423 and paid $930 a month in rent. Tenant moved from the unit in June 2009.
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> 2. Tenant lived in a unit that was reserved by Housing Provider as an affordable unit. In order to live there, Tenant had to meet income qualifications.
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> 3. Tenant suffers from severe to profound hearing loss. Petitioner's Exhibit (PX) 105. Tenant needs assistance from a hearing aid or a cochlear implant.
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> 4. During the Christmas holidays in December 2008, the fire alarms went off in the building and Tenant was unable to hear them. At that time, Tenant requested that Housing Provider to [sic] install a flash fire alarm in his apartment so as to alert him of an emergency. Tenant also asked that someone from the front desk enter his apartment in the event of an emergency since he

[2] The findings of fact are recited here using the same language and paragraph numbers as the ALJ in the Final Order.

would be unable to hear their knock at the door and may not be able to see the flash fire alarm if he were sleeping.

5. In February 2009, Housing Provider asked Tenant to provide his W-2 statements and pay stubs. Tenant's income information reflected that his income dropped $5,000. PX 102. Tenant's bi-weekly income went from $1,700 to $1,328.

6. In March 2009, Tenant met with Kelly Jones, Housing Provider's regional manager to discuss making his rental unit accessible to accommodate his disability.

7. A few weeks after Tenant's meeting with Kelly Jones, on March 31, 2009, Housing Provider served Tenant with a letter increasing Tenant's rent from $930 to $1,524.

8. On April 1, 2009, Tenant met with Vanessa Gomez, Housing Provider's property manager to appeal the increase of his rent and to ask for accommodations to his rental unit. Tenant met with Vanessa Gomez on June 4, 2009 to appeal the rent increase. Housing Provider denied Tenant's appeal not to raise his rent.

9. Tenant moved from the rental unit in June 2009 because the rent was too high.

Final Order at 2-3; R. at 51-52. The ALJ made the following conclusions of the law in the Final Order:[3]

B. Notice to Housing Provider[4]

1. Housing Provider/Respondent was properly served by mail with the CMO issued on August 19, 2009, which gave notice of the hearing on October 19, 2009, at 9:30 a.m. Because the Scheduling Order setting the hearing date was mailed to Housing Provider's last known address, Housing Provider/Respondent received proper notice of the hearing date. D.C. OFFICIAL CODE § 42-3502.16(c) [(2001)]; *Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1086 (D.C. 2007) (notice is adequate if properly mailed and not returned to sender); *see also Jones v. Flowers*, 547 U.S. 220, 226 (2006) ("due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested

[3] The conclusions of law are recited here as stated by the ALJ in the Final Order except that the Commission has numbered the ALJ's paragraphs for ease of reference.

[4] The Commission has omitted a recitation of the ALJ's statement of jurisdiction. *See* Final Order at 3; R. at 51.

parties of the pendency of the action'"[)] (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

2. OAH Rule 2818.3, 1 DCMR [§] 2818.3 [(2004)], provides, in part:

> Unless otherwise required by statute, these Rules or an order of this administrative court, where counsel, an authorized representative, or an unrepresented party fails, without good cause, to appear at a hearing, or a pretrial, settlement or status conference, the presiding Administrative Law Judge may dismiss the case or enter an order of default in accordance with D.C. Superior Court Civil Rule 39-I.

3. D.C. Superior Court Civil Rule 39-I(c) provides that:

> When an action is called for trial and a party against whom affirmative relief is sought fails to respond, in person or through counsel, an adversary may where appropriate proceed directly to trial. When an adversary is entitled to a finding in the adversary's favor on the merits, without trial, the adversary may proceed directly to proof of damages.

4. Because Housing Provider/Respondent failed to appear at the hearing after receiving proper notice, it was appropriate to proceed to take evidence in Housing Provider's absence and to render a decision based on the evidence that Tenant presented. D.C. Superior Court Civil Rule 39-I(c).

C. Tenant's Claim that Housing Provider Retaliated Against Him in Violation of the Rental Housing Act

5. Tenant alleges that Housing Provider retaliated against him by increasing Tenant's rent by $594 effective in the same year he moved into the rental unit because Tenant sought to enforce provisions of his lease by requesting Housing Provider make modifications and accommodations due to Tenant's hearing disability.

6. "Retaliatory action" is action intentionally taken against a tenant by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 of the Act. The Rental Housing Act prohibits a housing provider from retaliating against tenants who exercise any of the six protected acts enumerated in the statute. D.C. OFFICIAL CODE § 42-3505.02(b) [(2001)]. Retaliatory action includes, but is not limited to "any action or proceeding not otherwise permitted by law which . . . would unlawfully increase rent . . . ."[] D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)]. *See also* 14 DCMR [§] 4303.3 [(2004)]. The law also provides that retaliatory action should be presumed "if within the 6 months preceding the housing provider's action," the tenant, *inter alia*, made an effort to secure or enforce any of the

tenant's rights under [the] tenant's lease or contract with the housing provider. D.C. OFFICIAL CODE §§ [sic] 42-3505.02(b)(5) [(2001)].

7. The determination of retaliatory action requires a two step analysis, which is outlined in the provisions of the Act. First, it must be determined whether the housing provider committed an act that is considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)]. In this case, Housing Provider increased Tenant's rent effective May 1, 2009.

8. Second, the tenant must raise the presumption of retaliation by establishing that the housing provider's conduct occurred within six months of the tenant performing one of the six protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b) [(2001)]. If so, the statute by definition applies, and the landlord is presumed to have taken "an action not otherwise permitted by law," and retaliation is presumed. *See Borger Mgmt*[.] *Inc.*, [sic] *v. Miller*, TP-27,445 (RHC Mar. 4, 2004) at 7 (*citing Youssef v. United Mgmt. Co., Inc.*, 683 A.2d 152, 155 (D.C. 1996)). The burden then shifts to the housing provider to come forward with clear and convincing evidence that their actions were not retaliatory. *See Youssef*, 683 A.2d at 155.

9. The evidence demonstrates that Tenant's rent was $930 and the lease term was from June 18, 2008 to June 17, 2009. PX 100. The lease indicates that the "Lessee shall be required to execute a certification of Lessee's annual income at the time Lessee enters into this Lease and shall be required to update such certification from time to time, upon landlord's request and upon lease renewal . . . ." PX 100. In December 2008, Tenant asked Housing Provider to install a flash fire alarm in the rental unit because of his hearing disability. Housing Provider asked Tenant to supply income information in February 2009. The information Tenant supplied to Housing Provider reflected that his income decreased by $5,000. PX 102. Tenant was expecting either his rent remain the same or be decreased.

10. Tenant met with Kelly Jones, Housing Provider's regional manager in March and weeks later received a letter dated March 31, 2009, in which Vanessa Gomez, Housing Provider's property manager states that, "based on your new income information you provided, effective May 1st, 2009, your monthly rental rate will increase from $930 to $1,524." PX 104. Tenant appealed his rent increase in meetings with Kelly Jones, in March 2009, and Vanessa Gomez in April 2009 and again with Kelly Jones on June 4, 2009. PX 102.

11. Tenant successfully raised the statutory presumption of retaliation because Housing Provider increased his rent on March 31, 2009 which is within three months of Tenant's request under the provisions of the lease that Housing Provider make modifications and accommodations to the rental unit. A tenant seeking to enforce the provisions of the lease is one of the protected actions

> listed in the Act that triggers the presumption of retaliation. No representative from Housing Provider appeared to rebut the presumption of retaliation therefore Tenant has established that Housing Provider's act of increasing his rent was retaliatory.

Final Order at 4-7; R. at 47-50 (footnotes omitted).

On October 8, 2010, the Housing Provider filed a Notice of Appeal ("Notice of Appeal") with the Commission, asserting the following:[5]

> 1. OAH failed to direct the [T]enant [P]etitioner to identify with specificity his housing provider, and therefore his petition was filed against a nonexistent entity. OAH thus failed to serve [Columbia Heights Ventures Parcel 26,] LLC [d/b/a Highland Park Apartments (the "LLC")] in accordance with law and constitutional requirements of [d]ue [p]rocess. As a consequence, the Final Order is void as a matter of law, and must be vacated.

Notice of Appeal at 1. Thereafter on December 13, 2010, the Housing Provider filed a second Notice of Appeal ("Second Notice of Appeal") from the ALJ's December 2, 2010 order denying the Housing Provider's "Motion to Vacate Final Order for Lack of Jurisdiction," with the Commission, alleging the following:

> 1. The judge [(ALJ)] erred in treating the motion [(Housing Provider's "Motion to Vacate Final Order for Lack of Jurisdiction" (hereinafter, "Motion to Vacate")], as a motion for reconsideration and, thus, in concluding she lacked jurisdiction to consider it. Because the Housing Provider challenged the underlying decision as being void for lack of personal jurisdiction, the motion was to vacate the decision below as void, pursuant to S.C.R. Civ. 60, not S.C.R. Civ. 59. And based on the argument therein and attached affidavit, the judge abused her discretion in not granting it, because it is clear that service of the petition and subsequent orders were never made in a manner the law requires.

See Second Notice of Appeal at 1. On January 6, 2011, the Housing Provider filed a motion to consolidate the Notice of Appeal and Second Notice of Appeal.[6] *See* Housing Provider's Motion

[5] The issue raised on appeal is recited here as stated by the Housing Provider in the Notice of Appeal except that the Commission has numbered the Housing Provider's paragraph for ease of reference.

to Consolidate Appeals, Vacate Judgment and Remand for Hearing De Novo ("Motion to Consolidate") at 1. On August 5, 2013, the Housing Provider filed an appeal brief with the Commission. *See* Brief of Housing Provider/Appellant at 1. No brief was filed by the Tenant.

The Commission held a hearing on this matter on August 27, 2013.

II. PRELIMINARY ISSUE ON APPEAL

Based upon its review of the record, the Commission *sua sponte* raises a preliminary matter regarding the Housing Provider's "standing" to file an appeal of the instant case to the Commission, since it did not attend or otherwise participate in the October 19, 2009 OAH hearing. *See* Riverside Hosp. v. D.C. Dep't of Health, 944 A.2d 1098, 1103-1104 (D.C. 2008) (citing United States v. Storer Broadcasting Co., 531 U.S. 192, 197 (1956)) ("[q]uestions of standing may be raised *sua sponte* by this or any court"); Gaetan v. Weber, 729 A.2d 895, 897 n.1 (D.C. 1999) (citing Speyer v. Barry, 588 A.2d 1147, 1159 n.24 (D.C.1991)) ("standing is a jurisdictional issue which the court may raise at any time"); Nwankwo v. D.C. Rental Hous. Comm'n, 542 A.2d 827, 828 n.2 (D.C. 1988) (citing Lee v. D.C. Bd. of Appeals & Review, 423 A.2d 210, 215 (D.C.1980)) (raising the issue of the tenant's standing *sua sponte*). "It is well-established that a party who fails to appear at an evidentiary hearing before the Rent Administrator [or OAH] generally lacks standing to appeal from the decision which flows from that hearing." Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012); Sydnor v. Johnson, TP

[6] The Commission granted the Housing Provider's Motion to Consolidate the Notice of Appeal and the Second Notice of Appeal on the record at the Commission's hearing, having received no opposition to the motion from the Tenant. *See* Hearing CD (RHC Aug. 27, 2013). *See* 14 DCMR § 3811.1 (2004) ("If two (2) or more persons are entitled to an appeal from an order of the Rent Administrator and their interests are such as to make joinder practicable, they may . . . move to consolidate their separate appeals by a motion to consolidate"); Noori v. Whitten, TP 27,045 & TP 27,046 (RHC Jan 4, 2002) (granting motion to consolidate where the Commission determined that the interests of the housing provider were identical in both cases); Carillon House L.P. v. Carillon House Tenants Ass'n, CI 20,666; CI 20,686 (RHC Dec. 28, 1999) (consolidating cases where the parties were identical, the property was identical, and the issues were "similar, if not identical").

26,123 (RHC Nov. 1, 2002), at 4 (quoting Wofford v. Willoughby Real Estate, HP 10,687 (RHC Apr. 1, 1987), at 2.). *See, also,* DeLevay v. D.C. Rental Hous. Comm'n, 411 A.2d 354 (D.C. 1980). However, the Commission has long recognized an exception to this rule, when a party alleges that it did not receive legally sufficient notice of the evidentiary hearing. Tillman, RH-TP-08-29,136; Sydnor, TP 26,123, at 6; Johnson v. Sollins, TP 23,498 (RHC Oct. 20, 1997), at 4; Wofford, HP 10,687, at 2. *See, also,* DeLevay, 411 A.2d at 360 n.17.

In assessing a claim by a party contesting default, the Commission is guided by the following standards: (1) whether the party contesting default had actual notice of the proceeding; (2) whether such party acted in good faith; (3) whether such party acted promptly after learning of the default; and (4) whether such party presented a prima facie adequate defense to the opposition's claims. Radwan v. D.C. Rental Hous. Comm'n, 683 A.2d 478, 481 (D.C. 1996); *See* Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979); Sydnor, TP 26,123, at 6-7. Against these factors, the Commission must consider any prejudice to the party seeking default if relief were granted to the party contesting default. Radwan, 683 A.2d at 481; Dunn, 408 A.2d at 993. The burden of proof for entitlement to relief is on the party contesting default. Radwan, 683 A.2d at 481; Johnson, TP 23,498, at 4.

The Commission will proceed to apply the D.C. Court of Appeals' (DCCA) analytical framework in Radwan, 683 A.2d at 481, to the record and the Housing Provider's assertions in the instant case to determine whether the Housing Provider has standing to appeal the Final Order.

1. **Whether the Housing Provider Received Proper Notice of the February 19, 2009 Hearing**

Proper notice of a hearing is mandated by the Act, case law, and principles of due process. D.C. OFFICIAL CODE §§ 2-509(a), 42-3502.16(c) (2001).[7] *See* Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 538-39 (D.C. 2002); Chevy Chase Citizens Ass'n v. D.C. Council, 327 A.2d 310, 314 (D.C. 1974); Boyd v. Warren, RH-TP-10-29,816 (RHC June 5, 2013); Borger Mgmt. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009). The OAH's regulations provide that "[i]f a hearing is timely requested by any party, the [OAH]...shall send notice of the time and place of the hearing by certified mail or other form of service which assures delivery at least 15 days before the commencement of the hearing." 1 DCMR § 2923.1 (2004) (emphasis added). *See also* Prosper v. Pinnacle Mgmt., TP 27,783 (RHC Sept. 18, 2012); Reckord v. Peay, TP 24,896 (RHC Aug. 9, 2002) at 7-8; Reaves v. Byrd, TP 26,195 (RHC July 24, 2002).

The Commission has held that "Priority Mail with delivery confirmation" meets the "assures delivery" standard under 1 DCMR § 2923.1 (2004), but only when the agency has actually confirmed delivery, documented it, and placed that documentation in the official record. In Prosper, TP 27,783, the Commission recently determined that the tenant was not sent proper notice of the RACD hearing because the zip code on the hearing notice did not match the zip code listed on the tenant petition. *See also* Reaves, TP 26,195 (determining that housing provider was denied due process of law where DCRA mailed the notice of hearing to an incorrect address); Boyd, RH-TP-10-29,816; Sellers v. Lawson, RH-TP-08-29,437 (RHC Dec. 6, 2012); Ross v. Glenmont Corp., TP 27,850 (RHC Feb. 20, 2004); Reckord, TP 24,896.

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[7] D.C. OFFICIAL CODE § 2-509(a) (2001) provides, in relevant part: "[i]n any contested case, all parties thereto shall be given reasonable notice of the afforded hearing by the Mayor or the agency, as the case may be . . . ."

D.C. OFFICIAL CODE § 42-3502.16(c) (2001) provides, in relevant part: "[i]f a hearing is requested timely by either party, notice of the time and place of the hearing shall be furnished the parties by certified mail or other form of service which assures delivery . . . ."

In Prosper, TP 27,783, for example, both the tenant petition and the hearing notice listed the tenant's address as "2500 Wisconsin Ave. N.W. Apt. # 112, Washington, DC 20007." *See* Prosper, TP 27,783 at 11 (emphasis added). However, the Commission's review of the record revealed that the United States Postal Service (USPS) "'Track & Confirm' Notice" indicated that the hearing notice was delivered to "WASHINGTON, DC 20008." *See id.* at 12 (emphasis added). The Commission in Prosper, TP 27,783, explained that it was not satisfied that the Rent Administrator had properly confirmed delivery of the hearing notice where the substantial record evidence demonstrated an inconsistency between the zip code in the tenant petition, and the zip code on the USPS Track and Confirm Notice. *See id.* at 13. The Commission determined that the record lacked substantial evidence to show that the tenant had received proper notice of the hearing.[8] *See id.*

In this case, the Tenant provided the following name and address for the Housing Provider in the Tenant Petition: Highland Park, 1400 Irving Street, Washington, DC 20010. Tenant Petition at 1; R. at 21. The CMO issued on August 19, 2009 by the ALJ scheduling a hearing on the petition for October 19, 2009, certifies that a copy of the CMO was served by "Priority Mail with Delivery Confirmation" to the Housing Provider as follows: Highland Park Apartments, Attn: Vanessa Gomez, Property Manager, 1400 Irving Street, NW, Washington, DC 20010. CMO at 8; R. at 31. The record also contains a USPS Delivery Confirmation Receipt

[8] As we observed in Prosper:

> Inasmuch as the USPS Notice indicates that the Official Notice of Hearing was delivered to a different zip code from the address provided in the tenant petition, the Commission is not satisfied that either OAD or the Rent Administrator "confirmed delivery" of the Official Notice of Hearing to the Tenant. *See id.* Therefore, pursuant to our decision in Reckord[, TP 24,896], the method of service was not one that "assures delivery" under D.C. OFFICIAL CODE § 42-3502.16(c) (2001). *Id.* In the absence of any other proof, the record lacks substantial evidence demonstrating that the Tenant was sent proper notice. *Id.*

See Prosper, TP 27,783.

(Delivery Confirmation Receipt) and a corresponding "Track & Confirm" Notice (Track & Confirm Notice). *See* R. at 29. The Delivery Confirmation Receipt is labeled with the following name and address: Highland Park Apartments, Vanessa Gomez, Property Manager, 1400 Irving Street, NW, Washington, DC 20010. *See id.* The Delivery Confirmation Receipt is date stamped August 19, 2009, and has the following delivery confirmation number on it: "0307 1790 0002 0915 5092." *See id.* The Track & Confirm Notice contains the same delivery confirmation number as the Delivery Confirmation Receipt, and indicates that the "item was delivered at 4:47 PM on August 20, 2009 in WASHINGTON, DC 20010." *See id.*

The Commission's review of the record reveals that there is a discrepancy between the Housing Provider's zip code listed in the parties' lease agreement, and the zip code provided elsewhere in the record, including on the Tenant Petition, the CMO, the Delivery Confirmation Receipt, and the Track & Confirm Notice. *See* Tenant's Exhibit 100 at 1; CMO at 8; Tenant Petition at 1; R. at 21, 31, 55. The Commission observes that the parties lease agreement, submitted by the Tenant at the OAH hearing as Tenant's Exhibit 100, lists the following address for the Housing Provider: "1400 Irving Street, NW, Washington, DC 20009." *See* Tenant's Exhibit 100; R. at 55 (emphasis added). However, the Commission observes that the Tenant Petition, the CMO, and the Delivery Confirmation Receipt provide that the Housing Provider's zip code is 20010. CMO at 8; Tenant Petition at 1; R. at 21, 31. Furthermore, the Track & Confirm Notice states that the CMO was delivered to zip code 20010. R. at 29.

As in Prosper, TP 27,783, the Commission is unable to determine in this case, in light of the discrepancy in the Housing Provider's zip code on the lease agreement (i.e., "20009") and the zip code for the Housing Provider identified by the Tenant in the Tenant Petition and by OAH in the Delivery Confirmation Receipt and the Track & Confirm Notice for the CMO (i.e., "20010"),

that there is substantial evidence in the record that delivery was assured because that the Housing Provider was given proper notice of the OAH hearing Prosper, TP 27,783. *See supra* at 9. *See also* 1 DCMR § 2923.1 (2004); Tenant's Exhibit 100 at 1; CMO at 8; Tenant Petition at 1; R. at 21, 31, 55. The Commission thus determines that its analysis of this factor does not support a conclusion that the Housing Provider received proper notice of the February 19, 2009 OAH hearing as required by the Act.

2. **Whether the Housing Provider's Failure to Attend the February 19, 2009 Hearing Was Done in Good Faith**

The Commission's review of the record does not reveal substantial, undisputed evidence to support a determination that the Housing Provider did not act in "good faith" in failing to attend the October 19, 2009 hearing. *See* Radwan, 683 A.2d at 481; Dunn, 408 A.2d at 993; Sydnor, TP 26,123, at 6-7.

3. **Whether the Housing Provider Acted Promptly Upon Learning About the Final Order**

The Commission's review of the record indicates that there is substantial evidence to support a determination that the Housing Provider's October 8, 2010 Notice of Appeal was timely filed with the Commission, in accordance with 14 DCMR §§ 3802.2, 3816.1-.3 (2004).[9] *See* Radwan, 683 A.2d at 481; Dunn, 408 A.2d at 993; Sydnor, TP 26,123, at 6-7.

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[9] 14 DCMR § 3802.2 (2004) provides the following:

> A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator [or an ALJ] is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.

14 DCMR §§ 3816.1-.3 provide the following:

> 3816.1 In computer any period of time prescribed or allowed under this chapter, the day of the act, event, or default for which the designated time period beings to run shall not be included.

4. **Whether the Housing Provider Presented Adequate *Prima Facie* Defenses to the Tenant's Claims**

As noted *supra* at 2, the Tenant made the following claim in the Tenant Petition: "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 20. In order to present an adequate *prima facie* defense, "[a]ll that is required is that the moving party provides 'reason to believe that vacating the judgment will not be an empty exercise or a futile gesture.'" Frausto v. U.S. Dept. of Commerce, 926 A.2d 151, 157 (D.C. 2007) (*quoting* Nuyen v. Luna, 884 A.2d 650, 657 (D.C. 2005)).

Once the Tenant raises the presumption of retaliation under D.C. OFFICIAL CODE § 42-3505.02(b) (2001), *see* Final Order at 7; R. at 47, the burden shifts to the Housing Provider to come forward with "clear and convincing" evidence to rebut the presumption that its actions were retaliatory. *See* D.C. OFFICIAL CODE § 42-3505.02(b) (2001);[10] Smith v. Joshua, RH-TP-07-28,961 (RHC Feb. 3, 2012); Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012); Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005).

As a result of the Commission's review of the record, and the Housing Provider's Notice of Appeal, the Commission is satisfied that the Housing Provider failed to provide any *prima*

> 3816.2 The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday.
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> 3816.3 When the time period prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

[10] D.C. OFFICIAL CODE § 42-3505.02(b) (2001) provides, in relevant part, the following:

> 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 . . . .

facie defenses to the Tenant's claims in the Tenant Petition. Notice of Appeal at 1-3. From its review of the record, the Commission is unable to discern the nature, scope or merits of any *prima facie* defenses by the Housing Provider to the Tenant's claim of retaliation, much less "clear and convincing" evidence to rebut the presumption that the Housing Provider's actions were retaliatory. *See id.* In the absence of even arguable *prima facie* defenses, the Commission determines that the Housing Provider has not provided sufficient "reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *See* Frausto, 926 A.2d at 157 (*quoting* Nuyen, 884 A.2d at 657).

5. Whether Vacating the Default Judgment Would Prejudice the Tenant

Although there exists a "strong judicial policy favoring a trial on the merits . . . there is a possibility for prejudice to the nonmoving party when a judgment is vacated," and Radwan thus requires the Commission to weigh the aforementioned factors against the prejudice that re-opening the case and the proceedings would cause the non-moving party. *See* Radwan, 683 A.2d at 481. *See also* Tillman, RH-TP-08-29,136; Lenkin Co. Mgmt. v. Miller, TP 27,191, TP 27,192 & 27,193 (RHC June 4, 2004) at 7. In the instant case, setting aside the judgment would prejudice the Tenant, who prevailed on his claims before the ALJ, because the original case would have to be re-litigated, thus exposing the Tenant to the attendant expenses of litigation, the risk of an adverse judgment, and the possibility of further appeals. Furthermore, the record indicates that the ALJ imposed a substantial fine on the Housing Provider, having been satisfied that the preponderance of evidence in the record demonstrated the "willful" nature of the Housing Provider's alleged retaliatory actions against the Tenant. *See* Final Order at 7-9; R. at 45-47. Consequently, the Commission notes that vacating the default judgment seemingly impairs the realization of the remedial purposes of the Act, *see* Goodman v. D.C. Rental Hous.

Comm'n, 573 A.2d 1293, 1299-1300 (D.C. 1990),[11] by leaving the Tenant unable to vindicate his rights under the Act through the assessment of a penalty for a housing provider's willful, illegal behavior under the Act. *See, e.g.,* United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013) at 39-43; Washington v. A&A Marbury, LLC, RH-TP-11-30,151 (RHC Dec. 27, 2012) at 15-17; Borger Mgmt., RH-TP-06-28,854 at 20-21.

Having weighed all of the factors enumerated in Radwan, 683 A.2d at 481, the Commission determines that the due process implications of the ALJ's failure to ensure that the Housing Provider was properly given notice of the OAH hearing outweigh the Housing Provider's failure to present any *prima facie* defenses to the claim of retaliation in the Tenant Petition, and any potential prejudice to the Tenant in vacating the default judgment. D.C. OFFICIAL CODE §§ 2-509(a), 42-3502.16(b) (2001); 1 DCMR § 2923.1 (2004). *See* Cafritz, 798 A.2d at 538-39; Radwan, 683 A.2d at 481; Prosper, TP 27,783; Reckord, TP 24,896 at 7-8; Reaves, TP 26,195. Therefore, the Commission is satisfied that the Housing Provider has standing on appeal. D.C. OFFICIAL CODE §§ 2-509(a), 42-3502.16(b) (2001); 1 DCMR § 2923.1 (2004). *See* Cafritz, 798 A.2d at 538-39; Radwan, 683 A.2d at 481; Prosper, TP 27,783; Reckord, TP 24,896 at 7-8; Reaves, TP 26,195. Accordingly, the Commission reverses the ALJ's Final Order for failure to properly notify the Housing Provider of the OAH hearing, and remands this case for a de novo hearing on the merits. On remand, the Commission instructs the

[11] The DCCA in Goodman, 573 A.2d at 1299 (citations omitted), states the following about the remedial purposes of the Act:

> Our Rental Housing Act was designed, in substantial part, to protect low and moderate-income tenants from the erosion of their income from increased housing costs. The Act is remedial in character. Like other such legislation, it should be liberally construed to achieve its purposes. The wealthiest among us do not live in low-to moderate-income housing, and many complainants in cases brought under the Act are not affluent, nor are they in a position to afford to retain private counsel to conduct protracted proceedings before the Commission and the courts. Like the civil rights statute . . . the Act relies largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings.

ALJ to ensure that the hearing notice is sent to the Housing Provider's proper address, in accordance with D.C. OFFICIAL CODE §§ 2-509(a), 42-3502.16(b) (2001) and 1 DCMR § 2923.1 (2004). In light of the Commission's determination of the foregoing preliminary issue on appeal, the Commission will not address the issues raised by the Housing Provider in the Notice of Appeal or Second Notice of Appeal.

III. CONCLUSION

In accordance with the foregoing, the Commission reverses the ALJ's Final Order for failure to properly notify the Housing Provider of the OAH hearing, and remands this case for a de novo hearing on the merits, with instructions for the ALJ to ensure that the hearing notice is sent to the Housing Provider's proper address, in accordance with D.C. OFFICIAL CODE §§ 2-509(a), 42-3502.16(b) (2001) and 1 DCMR § 2923.1 (2004).

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

MARTA W. BERKLEY, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR §3823.1 (2004), provides, "[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."

JUDICIAL REVIEW

Pursuant to D.C. 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:

D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
430 E Street, N.W.
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in **RH-TP-09-29,593** was mailed, postage prepaid, by first class U.S. mail on this **27th day** of **September, 2013** to:

Roger D. Luchs, Esq.
Gwynne L. Booth, Esq.
Greenstein DeLorme and Luchs, PC
1620 L Street, NW, #900
Washington, DC 20036

Christopher Sutton
3318 Georgia Ave., NW, #21
Washington, DC 20010

LaTonya Miles
Clerk of the Court
(202) 442-8949